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**Can the Law Save Saveable Marriages? - Lessons for the  
Government in the Wake of the Family Law Act 1996.**

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**University of Durham,**

**Master of Jurisprudence, 2004.**

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25 AUG 2004

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### **Abbreviations of Frequently Cited Journals.**

**C.F.L.Q.R.** *Child and Family Law Quarterly Review*

**C.L.P.** *Current Legal Problems*

**F.L.** *Family Law*

**I.J.L.P.F.** *International Journal of Law, Policy and the Family*

**I.J.S.L.** *International Journal of the Sociology of Law*

**J.S.W.F.L.** *Journal of Social Welfare and Family Law*

**L.Q.R.** *The Law Quarterly Review*

**M.L.R.** *The Modern Law Review*

**Y.L.J.** *The Yale Law Journal*

# **Can the Law Save Saveable Marriages? - Lessons for the Government in the Wake of the Family Law Act 1996.**

**Jan Ewing.**

**University of Durham, Master of Jurisprudence, 2004.**

## **Abstract.**

The Family Law Act 1996 (the FLA) received Royal Assent on 4<sup>th</sup> July 1996. The FLA was to introduce compulsory information meetings<sup>1</sup>, offer a meeting with a marriage counsellor<sup>2</sup> (free if eligible for non-contributory legal aid) and extend legal aid (where entitled) to fund marriage counselling.<sup>3</sup> A minimum 12-month period for reflection and consideration<sup>4</sup> would replace the current fault/consent based divorce procedure and before granting the divorce future arrangements needed to be finalised.<sup>5</sup>

The information meetings were extensively piloted and the Final Evaluation Report presented in September 2000. The Lord Chancellor's Department issued a Press Release on 16<sup>th</sup> January 2001 indicating the Government's intention to repeal Part II of the FLA, stressing the Government's commitment to supporting marriage and families, especially those with children, but concluding that this and other research in the field, had shown that Part II of the FLA "is not the best way of achieving those aims."

In the light of this decision, this research will examine whether the Government's aim of saving what it terms "saveable marriages" is achievable through legislation.

Having considered briefly the historical development of the "saving saveable marriages" rhetoric and the perceived failings in the current and proposed law, whether the Government ought to be intervening in an otherwise quintessentially private arena will be examined. Arguing that a paternalistic approach is defensible given the economic and social costs to the community and the risks to the vulnerable, particularly children, when relationships fail, whether the aim is achievable within divorce legislation or by other legislative means will be addressed. Concluding that the degree of behavioural modification achievable through legislative change is minimal, the research will consider what measures might achieve the Government's aim of saving "saveable marriages."

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<sup>1</sup> Family Law Act 1996 s.8

<sup>2</sup> *Ibid.* s.8(6)(b)

<sup>3</sup> *Ibid.* s.23(3)

<sup>4</sup> *Ibid.* s.7

<sup>5</sup> *Ibid.* s.9

## **Chapter 1: The “Part 1” Aims in Context.**

In the early 1990s an increasingly vociferous debate raged in both the media and Parliament concerning the perceived decline and potential demise of the family, with both main political parties vying to be viewed as “the party of the family.”<sup>1</sup> Many advocated a return to what are deemed to be traditional family values and the high divorce rate was blamed for a plethora of social ills. For example, Lord Ashbourne in a House of Lords debate over the Family Law Bill stated:

“If the Government are really concerned about the problems of law and order and child abuse they must end the policies that encourage the one-parent family and introduce measures that build up and support the traditional nuclear family .... Unless the Government are prepared to confront the threat which the collapse of the traditional family presents to the nation the problems will continue to escalate.”<sup>2</sup>

Sentiments concerning the centrality of the family, which invariably meant families bound by marriage, pervaded the debates over the Family Law Bill. For example, during the Bill’s second reading in the House of Lords, the then Lord Chancellor, Lord Mackay of Clashfern, stated:

“I personally believe that marriage should be for life. This is the ideal I believe most couples who marry strive for. It is the ideal which provides the most stable and secure background for the birth and development of children.”<sup>3</sup>

Inevitably concerns over escalating divorce rates led to calls for a greater emphasis on effecting reconciliation to be included in any amended legislation. Lord Ashbourne argued:

“It is mediation on which the Bill focuses and I suggest that it is reconciliation on which it should focus.”<sup>4</sup>

The concerns expressed over the perceived decline of the traditional nuclear family and the need for legislation to support and preserve stable marital units is not new however and such fears pervade the rhetoric of debates and reports concerning the family throughout the last century.

The Matrimonial Causes Act 1937, which extended the grounds for divorce from adultery only to include fault (or unsound mind), included in its objectives listed in its preamble the “true support for marriage.”<sup>5</sup>

The remit of the Committee set up under Mr Justice Denning in 1946 included “whether any (and if so what) machinery should be made available for the purpose of attempting a reconciliation between the parties.” A key conclusion of the Committee’s Final Report was that “the unity of the family is so important that, when parties are estranged, reconciliation should be attempted in every case where there is a prospect of success.”<sup>6</sup> However despite the rhetoric little was done over the following 10 years to actively promote reconciliation. As Eekelaar tellingly comments,

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<sup>1</sup> Day Sclater, S. and Piper C. (1999) ‘The Family Law Act in Context’, in S. Day Sclater and C. Piper (eds.) *Undercurrents of Divorce*, p.6.

<sup>2</sup> Hansard, HL col 170, 20 November 1995

<sup>3</sup> Hansard, HL col 704, 30 November 1995

<sup>4</sup> Hansard, HL col 170, 20 November 1995

<sup>5</sup> Walker, J. (2001) ‘Divorce Reform and The Family Law Act’ in J. Walker (Research Director) *Information Meetings and Associated Provisions within the Family Law Act Final Evaluation Report* (‘Final Evaluation Report’), p19

<sup>6</sup> *The Final Report of the Denning Committee on Procedure in Matrimonial Cases* 1947 Cmnd 7024 para. 4

"the goal of reconciliation had faded from the remit, perhaps because the aspirations of reconciliation could not survive confrontation with reality."<sup>7</sup>

In 1956 the *Morton Report* argued that unless the tendency to resort too readily and too lightly to divorce could be checked, "there is real danger that the conception of marriage as a life-long union of one man with one woman may be abandoned. This would be an irreparable loss to the community."<sup>8</sup> Indeed the authors went as far as suggesting that it may be better to abolish divorce altogether to curb the perceived problem.

In 1963 the Labour MP, Leo Abse, introduced a bill to allow divorce on seven years separation with consent. The bill contained measures to promote reconciliation. During a debate on the bill on 21 June 1963 the Archbishop of Canterbury, Archbishop Ramsey, remarked, "If it were possible to find a principle at law of breakdown of marriage... which was protected by a far more thorough insistence on reconciliation procedure first, then I would wish to consider it."<sup>9</sup> In January 1964, in order to consider how this might be achieved the Archbishop invited a committee drawn from the church, the judiciary and academia to review England's divorce law and to consider whether any reforms could operate more justly, assist marital stability and do nothing to undermine a couple's approach to marriage as a lifelong covenant. Their report, *Putting Asunder* recommended divorce on the establishment of breakdown, but only after an inquisitorial hearing.<sup>10</sup>

The proposals of *Putting Asunder* were considered by the Law Commission in *The Field of Choice*<sup>11</sup> but were rejected on the grounds that this would entail "an elaborate, time-consuming and expensive investigation"<sup>12</sup> The Commission was concerned with the promotion of the "stability of marriage, reconciliation, maximum fairness, protection of children and the economically weaker spouse" and it concluded that a good divorce law would (1) buttress rather than undermine the stability of marriage; and (2) when, regrettably, a marriage has irretrievably broken down, enable the empty shell to be destroyed with the maximum fairness, and minimal bitterness, distress and humiliation."<sup>13</sup> It acknowledged that the law did not "do all it might to aid the stability of marriage, but tends rather to discourage attempts at reconciliation."<sup>14</sup> The Commission recommended that the court should have powers to order an adjournment for an attempt at reconciliation where appropriate.<sup>15</sup>

The Divorce Reform Act 1969 contained provisions to try to bring estranged couples back together. What is now section 6 (1) of the Matrimonial Causes Act 1973 requires a Solicitor to file a notice indicating whether they have discussed reconciliation with their client. However there is no positive duty on the Solicitor to discuss the possibility of reconciliation and no certificate is required if the client is entitled to advice and assistance under the Community Legal Services Legal Help (formerly Green Form) scheme. In their report investigating divorces which had proceeded under the 'Special Procedure' Davis and Murch found that 30% of their respondents indicated that their solicitor had not taken the trouble to check that they really wanted a divorce and only 18% reported that their solicitor had mentioned marriage guidance or other bodies that they could see with a view to possible reconciliation. Of these 19% had taken up the suggestion.<sup>16</sup> Section 6(2) provides that a court should not grant a decree if there is a chance of reconciliation, but should adjourn the proceedings for such an attempt to be made. However the potential strength of this provision has been significantly reduced by the introduction in 1977 of the Special Procedure system, since a District Judge will have great difficulty in assessing

<sup>7</sup> Eekelaar, J. (1991) *Regulating Divorce*, p.21

<sup>8</sup> *The (Morton) Royal Commission on Marriage and Divorce*, 1956, Cmnd. 9678, para. 50.f

<sup>9</sup> See Rheinstein, M. (1972) *Marriage Stability, Divorce and the Law*, p.323-324

<sup>10</sup> *Putting Asunder: A Divorce Law for Contemporary Society*, (1966), p. 38-39

<sup>11</sup> The Law Commission, *Reform of the Grounds of Divorce The Field of Choice*, 1966 Cmnd 3123

<sup>12</sup> *ibid.* para. 71

<sup>13</sup> *ibid.* para. 15

<sup>14</sup> *ibid.* para. 28

<sup>15</sup> *ibid.* para. 74

<sup>16</sup> Davis, G. and Murch, M. (1988) *Grounds for Divorce*, p. 57



whether there is a possibility of reconciliation from a review of the papers alone and the measures have been more or less futile. Whilst the desirability of encouraging reconciliation had featured strongly in the debates preceding The Divorce Reform Act 1969 they failed to be translated in any meaningful way into the legislation that followed, which Davis and Murch saw as "a quite remarkable phenomenon given the vigour of the debate that preceded the 1969 Act."<sup>17</sup>

Throughout the 1970's attention was focused arguably more on saving costs than saving marriages<sup>18</sup> and it was not until 1979 when the question of divorce reform was considered further in The Law Society's report, *A Better Way Out*. The authors advocated a separation based divorce law to avoid impetuous decisions to divorce, commenting, "though a compulsory period for reflection might not save many marriages, it would be of value even if it saved a few, provided it was not so long as to cause hardship or resentment in others."<sup>19</sup>

By the late 1980's criticisms of the 1969 Act (which had been consolidated into the Matrimonial Causes Act 1973) were mounting.<sup>20</sup> The *Booth Report* in 1985 criticised the fault element in the existing legislation for frequently exacerbating the bitterness and frustration experienced by divorcing couples.<sup>21</sup>

In 1988, the Law Commission published the first of two reports addressing the issue of divorce reform, arguing that the existing law falls far short of its objectives, is "incoherent" and "confusing", is "neither understandable nor respected", that the aims of attaining maximum fairness and minimum bitterness were "rendered impossible by the retention of the fault element" and that the hostility that the current system evokes makes divorce more painful for the parties and any children, "destroys any chance of reconciliation and may be detrimental to post divorce relationships."<sup>22</sup> It further criticises the present system for distorting the bargaining positions of the parties where one is desirous of a speedy divorce but only the other has grounds to proceed on either adultery or unreasonable behaviour.<sup>23</sup> In its second report, published in 1990<sup>24</sup>, the Law Commission, echoing its earlier sentiments, concluded that reform was needed. The Matrimonial Causes Act 1973 allows divorce where irretrievable breakdown is established on proof of one of the five facts set out in s.1 (2) namely adultery, unreasonable behaviour, desertion for two years, two years separation with consent and five years separation without consent. The Law Commission recommended that these be abolished and replaced with proof of breakdown on the elapse of a minimum period of 12 months of "consideration and reflection."

The Law Commission's recommendations were accepted by the Government and embodied in a Green Paper in 1993.<sup>25</sup> Whilst recognising that the law cannot prescribe for happy marriages, divorce reform was to focus on the early identification of those marriages which are in difficulty but which are capable of being saved and the provision of appropriate support and counseling. It would provide "breathing space for examining the alternatives and for considering reconciliation."<sup>26</sup>

The White Paper<sup>27</sup> that followed largely reflected the Green Paper and the Law Commission's recommendations save that the proposal for individual information meetings was to be replaced

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<sup>17</sup> *ibid.* p.148

<sup>18</sup> Eekelaar, *Regulating Divorce*, *supra* note 7, p.27

<sup>19</sup> The Law Society, Family Law Sub Committee, (1979) *A Better Way Out*, para. 51

<sup>20</sup> For a full discussion on the criticisms of the current system see Chapter 4, section 1.

<sup>21</sup> Report of the Matrimonial Causes Procedure Committee (Chairman: The Hon. Mrs. Justice Booth DBE) (1985) Pt I, n.8, para 4.25

<sup>22</sup> *Facing the Future, A Discussion Paper on the Ground for Divorce* (1988) Law Comm. No. 170, para. 3.48

<sup>23</sup> *ibid.* para.3.20

<sup>24</sup> *The Ground for Divorce*, (1990) Law Commission No. 192.

<sup>25</sup> *Looking to the Future: Mediation and the Ground for Divorce*, (1993) Cm 2424.

<sup>26</sup> *ibid.* para. 1.5

<sup>27</sup> *Looking to the Future: Mediation and the Ground for Divorce: The Government's Proposals*, (1995) Cm 2799.

with group meetings. In November 1995, for the first time in 138 years, the Government itself put forward proposals for divorce reform<sup>28</sup> that were later to be embodied in the FLA.

The FLA provided for divorce on the proof of the elapse of 12 months and 14 days as recommended by the Law Commission. The proposed process in brief required the spouse wishing to initiate the process to attend an information meeting. Attendance by the other spouse would be voluntary. After 3 months for reflection one or both parties could file a statement of marital breakdown<sup>29</sup> provided they have been married at least one year.<sup>30</sup>

The time for reflection and consideration would commence 14 days after the statement of marital breakdown is issued to allow for service on the other party. It was hoped that the parties would use this period to reflect on whether they really wanted a divorce and make use of marriage counseling. After 12 months and 14 days, if there were no children and neither party had applied for an extension of time (in which case the time would extend to 18 months and 14 days) the parties could apply for the divorce order and the court would grant the divorce provided arrangements for the children and finances were resolved<sup>31</sup> and neither party had applied to prevent the divorce on the basis of substantial financial or other hardship.<sup>32</sup>

The history of the rhetoric of marriage saving and reconciliation outlined above shows persistent concerns expressed throughout much of the last century and in particular from the 1960's onwards about the perceived decline of the family and the need to promote reconciliation wherever possible. What is remarkable about the 1996 legislation, however, is that it enshrines in legislation for the first time a tangible commitment to marriage saving, backed by proactive measures. The aims of the FLA, reflecting the recommendations of the Green and White Papers which preceded it, are set out in Part I, namely to support the institution of marriage,<sup>33</sup> to encourage all practical steps, by way of counselling or otherwise, to save the marriage,<sup>34</sup> to promote a conciliatory approach to divorce,<sup>35</sup> to reinforce the importance of continuity in parenting,<sup>36</sup> to avoid incurring unreasonable costs<sup>37</sup> and to provide protection from violence and abuse.<sup>38</sup>

The FLA was to herald a fundamental change in the whole philosophy of family law in the area of marriage and divorce and was welcomed by critics of the existing regime who hoped that the removal of fault might reduce hostility and bitterness. The Lord Chancellor also expressed the view that the mandatory waiting period and the requirement that all necessary arrangements are made before the divorce is finalised "would reinforce and underline the institution of marriage and its inherent obligations and responsibilities."<sup>39</sup> The proposals were however met with a vociferous lobby of dissent in the media, most notably the Daily Mail, and the House of Lords. Lord Ashbourne expressed the view that the proposed divorce reforms would "deprive the innocent of justice."<sup>40</sup> Baroness Young argued that, "the removal of fault undermines individual responsibility. By removing it, the state is actively discouraging a concept of lifelong commitment in marriage ... Furthermore, it undermines the legal basis of marriage by making the contract meaningless."<sup>41</sup> The introduction of the 'Part I principles' into what became the FLA helped allay some of the concerns expressed by those fiercely opposed to the reforms.

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<sup>28</sup> See Walker, *Final Evaluation Report*, supra note 5, p21.

<sup>29</sup> The Family Law Act 1996, s.6

<sup>30</sup> *ibid.* s.6 (2) and (3)

<sup>31</sup> *ibid.* s.9

<sup>32</sup> *ibid.* s.10

<sup>33</sup> *ibid.* s. 1(a)

<sup>34</sup> *ibid.* s.1 (b)

<sup>35</sup> *ibid.* s.1(c)(i)

<sup>36</sup> *ibid.* s.1(c)(ii)

<sup>37</sup> *ibid.* s.1(c)(iii)

<sup>38</sup> *ibid.* s.1(d)

<sup>39</sup> The Lord Chancellor, Lord Mackay of Clashfern, Official Report (H.L.), 30 November 1995 at col. 703.

<sup>40</sup> Hansard, HL col 170, 20 November 1995

<sup>41</sup> Hansard col. 733, HL 30 November 1995.

The innovations introduced by the FLA specifically to support marriages were fourfold. Firstly, there was to be the mandatory waiting period to give the parties an opportunity "to reflect on whether the marriage can be saved and to have an opportunity to effect a reconciliation."<sup>42</sup>

Secondly, central to the changes proposed by the FLA was the introduction of compulsory attendance at an Information Meeting at least three months before the filing of a statement of marital breakdown.<sup>43</sup> The compulsory three-month delay was intended to provide a cooling off period to allow parties to reflect before divorce proceedings were issued. Prescribed information was to be given at the meeting, to include information about marriage counselling and other marriage support services.<sup>44</sup> The purpose of the meeting was to ensure that people considering divorce have full information about the enormity of the step they are taking and the options available to them.<sup>45</sup> Six models of Information Meeting were piloted. Model A consisted of a 1-hour individual meeting covering the prescribed information with further information to take away. Model B was a 30 minutes individual meeting with a second group presentation on a separate occasion. Model C consisted of an individual marriage-focused meeting pre-proceedings and a second group presentation covering the prescribed topics post -proceedings. Model D was a stand-alone group presentation. Model E replicated Model A in CD-ROM format and Model F was a two stage meeting, the first replicating the individual meeting in Model C but in CD-ROM format and the second replicating the Model C group meeting.<sup>46</sup>

The Lord Chancellor was given authority to make rules requiring a person's legal representative to inform him or her about the availability of marriage support services<sup>47</sup> and to provide names and addresses of those qualified to help.<sup>48</sup> Such provisions have more force than the existing provisions<sup>49</sup> since they contain a positive duty on the legal representative to inform their client of available marriage support services and to provide names and addresses rather than merely a duty to certify whether reconciliation has been discussed or details of relevant agencies given.

Thirdly, the parties were to be given an opportunity to have a meeting with a marriage counsellor (MWMC) and were to be encouraged to attend such a meeting.<sup>50</sup> The meeting would be free of charge for those eligible for non-contributory public funding through the Community Legal Service.<sup>51</sup> Those eligible to attend the MWMC free of charge may also have been entitled to ongoing marriage counselling during the period for reflection and consideration, or when that period has been interrupted for reconciliation to be attempted.<sup>52</sup>

Finally, the Lord Chancellor was to be given powers, with Treasury approval, to make grants in connection with the provision of marriage support services and for research into the causes of and ways of preventing marital breakdown<sup>53</sup> having regard to the desirability of those services being available when first needed.<sup>54</sup> On 25 November 1999 the Lord Chancellor announced an increase in his Department's funding of marriage and relationship support from £3.2m in 1999-2000 to £5m in 2002-3.<sup>55</sup>

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<sup>42</sup> Family Law Act 1996, s.7 (1)(a)

<sup>43</sup> *ibid.* s.8 (2)

<sup>44</sup> *ibid.* s. 8. (9)(a)

<sup>45</sup> Walker, J. (2000) 'Information Meetings and Associated Provisions within the Family Law Act 1996, Summary of the Final Evaluation Report', Centre for Family Studies at the University of Newcastle upon Tyne (*Final Evaluation Report Summary*), p. vii

<sup>46</sup> *ibid.* p.7-9

<sup>47</sup> Family Law Act 1996, s.12 (2)(a)(i)

<sup>48</sup> *ibid.* s.12 (2)(b)(i)

<sup>49</sup> Matrimonial Causes Act 1973, s. 6(1)

<sup>50</sup> Family Law Act 1996, s.8 (6)(b)

<sup>51</sup> *ibid.* s.8 (12)

<sup>52</sup> *ibid.* s.23

<sup>53</sup> *ibid.* s.22 (1)

<sup>54</sup> *ibid.* s.22 (3)

<sup>55</sup> Lord Chancellor's Department. (2002) *Moving Forward Together. A Proposed Strategy for Marriage and Relationship Support for 2002 and Beyond*, Annex A

Before implementing such radical changes the Government chose to pilot the Information Meetings and the MMMC. Professor Janet Walker of the Centre for Family Studies at the University of Newcastle upon Tyne was appointed as Research Director to lead a research team to evaluate the pilots. The "primary task" of the team was to "examine the 'who, what, where, when and how' of information provision in order to advise on the best possible model for implementation."<sup>56</sup>

The Research team's Final Evaluation Report concludes that attempting to save marriage at the point of divorce is not particularly effective.<sup>57</sup> It advocates a more tailored approach to the provision of information arguing that there is little point in dwelling on marriage saving and marriage counselling if the attendee has taken a firm decision that divorce is the only option and is looking for information as to how to get on with it (referred to as the second and third level of ignorance) but that if the attendee is uncertain about the future or wants to save the marriage (the first level of ignorance), a focus on marriage support might be particularly helpful, while too much information about the divorce process might be unhelpful and off-putting (and might bounce them into the divorce process too soon.)<sup>58</sup> The Report therefore devises an alternative model more tailored to individual's needs and recommends the provision of information as part of a co-ordinated network of local services providing advice, counselling and mediation in a "one-stop-shop" facility.<sup>59</sup>

The Government chose not to pilot the alternative model of Information Meeting proposed in the Final Evaluation Report. On 17 June 1999 in response to a written Parliamentary Question on whether the Government still intended to implement Part II of the FLA in 2000 the Lord Chancellor replied,

"No, before implementing Part II, the Government must be satisfied that the new arrangements for divorce, which it puts in place, will work.... The preliminary research results are disappointing, in view of the Government's objectives of saving saveable marriages and encouraging the mediated settlement of disputes."<sup>60</sup>

The Lord Chancellor emphasised in a speech to the UK Family Law Conference on 25 June 1999 that family policy is "too important, too central to people's lives, for us to risk rushing headlong into change for change's sake, legislating in haste and repenting at leisure."<sup>61</sup>

The Government subsequently announced its intention to ask Parliament to repeal Part II of the FLA as it took the view that the research carried out at Newcastle, together with other research had indicated that Part II of was not the best way to achieve the Part I aims of "saving saveable marriages."<sup>62</sup> This criticism is perhaps misconceived given that the Information Meeting pilots were not set up specifically to 'divert' people into marriage support or mediation or to establish whether marriages could be saved by the proposed changes in legislation.<sup>63</sup>

Despite the decision not to implement Part II, the present Labour Government has continued to give family issues priority. It established an interdepartmental Ministerial Group on the family under the chairmanship of the Home Secretary that put forward a consultation document in 1998

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<sup>56</sup> Walker, *Final Evaluation Report Summary*, supra note 45, p. vii

<sup>57</sup> *Ibid.* p.73

<sup>58</sup> *Ibid.* p.79

<sup>59</sup> *Ibid.* p.90

<sup>60</sup> Quoted in Arnold, W. (2000) 'Implementation of Part II of the Family Law Act 1996: The Decision not to Implement in 2000 and Lessons Learned from the Pilot Meetings.' in Thorpe, The Rt. Hon. Lord Justice and E. Clarke (eds.) *No Fault or Flaw The Future of the Family Law Act*, p.14

<sup>61</sup> *Ibid.* p.15

<sup>62</sup> Press Release, Lord Chancellor's Department, 16 January 2001

<sup>63</sup> Walker, J. (2000) 'Whither the Family Law Act Part II?' in Thorpe, The Rt. Hon. Lord Justice and E. Clarke (eds.) *No Fault or Flaw The Future of the Family Law Act*, p.8

entitled *Supporting Families*.<sup>64</sup> The consultation document proposed a number of new developments, including dedicated helplines, Sure Start programmes, parent education, improvement in financial benefits, family-friendly employment practices, support for families with specific problems, including domestic violence, and suggestions for strengthening marriage.<sup>65</sup> One of its proposals, the establishment of a National Family and Parenting Institute, has already been brought about. Others are being modified and developed further. The role of the National Family and Parenting Institute is to provide a centre of expertise to enable different organisations to pool knowledge thereby enhancing the value and quality of family life; ensuring that parents have the support and information they need in bringing up their children and in finding the help and information they need.<sup>66</sup> The Government pledged £2m over three years to support the venture although the Institution will be run as an independent charity.

*Supporting Families* also focuses on supporting marriage. Chapter 4, entitled 'Strengthening Marriage' proposes better marriage preparation, prenuptial agreements concerning money and property, an enhanced role for marriage registrars to provide premarital counselling, a longer period of notice to be given personally by both parties intending to marry, modernisation and personalisation of the civil marriage service, access to mediation and counselling to support marriages in difficulty and better information meetings before divorce to "increase the chance of saving more marriages."<sup>67</sup>

Following on from *Supporting Families* the former Lord Chancellor, Lord Irvine issued a Press Release on 23<sup>rd</sup> March 2001 announcing the launch of Family Advice and Information Networks (FAINs). These would provide tailored information with a range of coordinated support services to both parents and children (where appropriate) in families experiencing problems, such support to be accessed through a single point of reference. Information, legal advice, mediation and counselling will be provided as appropriate. Pre-piloting began in spring 2002, with full piloting having commenced in the autumn. Initial piloting has involved ten firms of solicitors in five areas, with the pilots based in the offices of solicitors with franchises for family work, who have trained as solicitor mediators, and located in areas where a full range of family support services are available. It is of course too early to evaluate the success of this initiative in saving marriages.

On 25<sup>th</sup> November 1999 the Lord Chancellor also announced that a new advisory group was to be established to devise marriage and relationship support strategies beyond 2000/2001. The Group would include other Government departments and advisers from the private and voluntary sectors. Its purpose was to "develop a co-ordinated strategy for the delivering of marriage and relationship support to incorporate a pro-active approach to marriage and relationship support, with an emphasis on preventing relationship breakdown."<sup>68</sup> The Group's report, *Moving Forward Together* was published in April 2002. The key recommendations of the report include greater public education, dissemination and publicity regarding the availability of marriage support and how to obtain it, encouragement to parties to seek help early with a shift of emphasis from tertiary to primary intervention, the provision of appropriate, tailored information at the point of need which is accessible, timely and affordable, the improvement of support for children, recognising and catering for diversity of gender, ethnicity etc, provision of more varied and innovative forms of support, targeting resources effectively and supporting further research.<sup>69</sup>

Whilst the Government has decided not to implement Part II of the FLA, it is clear from developments since, as outlined above, that it is as committed as ever to pushing ahead with its attempts to 'save saveable marriages.' The remainder of this Paper will therefore look at whether

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<sup>64</sup> *Supporting Families: A Consultation Document*, Home Office (1998).

<sup>65</sup> Walker, J., Timms, N. and Collier, J. (2001) 'The Challenge of Social, Legal and Policy Change', in *Final Evaluation Report*, p.14

<sup>66</sup> *Moving Forward Together*, *supra* note 55, p.28

<sup>67</sup> *Supporting Families*, *supra* note 64, para. 4.12 For further details of the reforms to the Marriage Act suggested in *Supporting Families* that have already been implemented see Chapter 4, note 43.

<sup>68</sup> Press Notice, Lord Chancellor's Department, 11<sup>th</sup> April 2000.

<sup>69</sup> *Moving Forward Together*, *supra* note 55, p.5

the Government ought to be taking such a paternalistic approach in the area of marriage and divorce. If it should, the question of whether behaviour can be modified through legislative change will be examined and if behaviour modification is possible it will consider what legislative changes would most likely achieve the behavioural change sought.

## Chapter 2: Should the Law Attempt to Save "Saveable Marriages"?

*"Neither one person, nor any number of persons, is warranted in saying to another human creature of ripe years, that he shall not do with his life for his own benefit what he chooses to do with it."*<sup>1</sup>

Successive recent governments have stressed the foundational importance of family to society and their commitment to supporting marriage. Former Prime Minister, Margaret Thatcher, in 1981, stated marriage provides "the basic unit of our society" adding that "it is within the family that the next generation is nurtured."<sup>2</sup> The current Prime Minister, Tony Blair, in 1997 argued, "we cannot say that we want a strong and secure society when we ignore its very foundation: family life."<sup>3</sup> The introduction to *Supporting Families* states, "Families are at the heart of our society. Most of us live in families and we value them because they provide love, support and care. They educate us and they teach us right from wrong. Our future depends on their success in bringing up children. That is why we are committed to strengthening family life."<sup>4</sup> The former Lord Chancellor, Lord Irvine of Lairg, in his foreword to *Moving Forward Together*, states "evidence that strong, stable relationships are key to a healthy society, makes the case for providing support to those couples who want it."<sup>5</sup>

The Government assumes an implicit right to intervene in family matters when formulating family policy. This chapter will explore whether the Government is justified in taking a paternalistic stance with respect to the family, and in particular marriage.

### 1. The Public/Private Dichotomy

#### 1.1 Society's Ambivalence

Some critics argue that modern society has shown a degree of ambivalence over whether marriage is to be viewed as a private or a public matter.<sup>6</sup> Dewar maintains that there is currently a great deal of uncertainty in the family law arena as to exactly what family law should be attempting to do.<sup>7</sup> On the one hand marriage is increasingly seen as a matter for private ordering yet on the other, faced with the perceived crisis in the family and the escalating costs of divorce, the Government is prepared to be more prescriptive in dictating perceived 'good' divorcing behaviour (i.e. behaviour which is harmonious, settlement-minded and cost conscious).<sup>8</sup> Allied to this is the greater emphasis on rights rather than discretion. Dewar sees potential conflict in these developments since a greater emphasis on private autonomy gives greater scope for human rights to be abused or overlooked.<sup>9</sup> Rights thinking

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<sup>1</sup> Mill, J.S. 'On Liberty'

<sup>2</sup> Quoted in O'Donovan, K. (1993) *Family Law Matters*, p.57

<sup>3</sup> Quoted in Herring, J. (2001) *Family Law*, p.8.

<sup>4</sup> *Supporting Families*, Introduction, Para.1

<sup>5</sup> Lord Chancellor's Department. (2002) *Moving Forward Together. A Proposed Strategy for Marriage and Relationship Support for 2002 and Beyond*, Advisory Group on Marriage and Relationship Support, Summary Report, p.2

<sup>6</sup> Clark, D. and Haldane, D. (1990) *Wedlocked? Intervention and Research in Marriage*, p.72 see also generally Dewar, J. (1998) 'The Normal Chaos of Family Law' *M.L.R. Jul.*, Vol. 61, No 4, pp.467-485.

<sup>7</sup> Dewar, J. (2000) 'Family Law and its Discontents', *I.J.L.P.F.*, vol.14, p.79 See also Hale, Rt. Hon. Mrs Justice, (1997) 'The 8<sup>th</sup> ESRC Annual Lecture, Private lives and public duties: what is family law for?' *J.S.W.F.L.*, vol. 22(2), p.125

<sup>8</sup> Dewar, J. (2000) 'Family Law and its Discontents' *supra* note 7, p.68

<sup>9</sup> *ibid.*, p.74

emphasises an individual's entitlement to participate in marriage rather than preservation of marriage as an institution.<sup>10</sup>

Traditionally feminists have argued that family and family law are effectively the same, one cannot exist or function without the other and therefore to talk in terms of intervention or non-intervention is a "myth." "The personal", as has been famously said, "is political."<sup>11</sup> Freeman agrees that the family and the state are not separate entities, each contains the other and trying to formulate strict definitions of each is meaningless.<sup>12</sup> There is some merit in Freeman's argument – it is impossible to separate the family neatly from the state and the private from the public. Eekelaar would argue that in practical terms this matters little, the public/private divide is largely illusory. He advocates instead focusing on the notion of *public interest*.<sup>13</sup> If intervention can be justified on the grounds of public interest, for example with domestic violence, child abuse or to uphold a child's right to contact with the non-residential parent, then it should be upheld. This would comply with the Article 8 (2) requirements outlined below.<sup>14</sup> Elsewhere Eekelaar identifies the adjustment of family relationships in the event of family breakdown, the protection of individuals from harm within the family and the support and maintenance of family relationships as the area's justifying state intervention.<sup>15</sup>

## 1.2 Support for Private Regulation.

Perhaps the most potent argument against a paternalistic approach towards marriage is that marriage is a quintessentially private arrangement and decisions regarding the future of the marriage are so intimate in nature that they should be a matter of private ordering. Glendon, quoting John Stuart Mill in *On Liberty*, notes that in England there is "considerable jealousy" of interference by the State with private conduct because of the persisting belief that the interests of government are the opposite of the general population.<sup>16</sup>

The trend in Great Britain and most countries of western tradition has recently been away from the regulation of marriage and family life in favour of simply dealing with the economic and children issues following breakdown.<sup>17</sup> Mnookin and Kornhauser see the primary function of modern divorce law as providing a framework within which parties can negotiate their own settlements rather than the imposition of authority from above.<sup>18</sup> The introduction of no-fault divorce, had Part II of the FLA been fully implemented, and the increased emphasis on resolving matters by way of mediation could be seen as rendering the divorce process more a matter of private ordering.<sup>19</sup> That said, the compulsory attendance at an information meeting<sup>20</sup>, the restrictions on legal aid availability to those reluctant to attend mediation<sup>21</sup> and the requirement that all financial and children issues be dealt with before a divorce order is made<sup>22</sup>, arguably would have made the proposed legislative changes more prescriptive and interventionary.<sup>23</sup> These matters will be examined more fully in Chapter 4 below.

<sup>10</sup> *ibid.* p.73

<sup>11</sup> Houlgate, L. (1998) 'Must the Personal be Political? Family Law and the Concept of Family', *I.J.L.P.F.*, vol.12, p.107

<sup>12</sup> Freeman, M. (1985) 'Towards a Critical Theory of Family Law', *C.L.P.* p.170

<sup>13</sup> Eekelaar, J. (1989) 'What is 'Critical' Family Law?' *L.Q.R.* vol. 105 April, p.258

<sup>14</sup> European Convention of Human Rights, Article 8 (2)

<sup>15</sup> Eekelaar, J. (1984) *Family Law and Social Policy*. 2<sup>nd</sup> ed., pp.24/5

<sup>16</sup> Glendon, M.A., (1989) *The Transformation of Family Law, State, Law and Family in the United States and Western Europe*.p.85

<sup>17</sup> *ibid.* p.293 See also Lewis, J.(2001)'Debates and Issues Regarding Marriage and Cohabitation in the British and American Literature', *I.J.L.P.F.*, vol.15,p.175

<sup>18</sup> Mnookin, R.H. and Kornhauser, L., (1979) 'Bargaining in the Shadow of the Law: The Case of Divorce. *Y.L.R.* Vol 88, p.950

<sup>19</sup> Roche, J. (1999) 'Children and Divorce: A Private Affair?' in S. Day Sclater and C. Piper (eds.)*Undercurrents of Divorce*, p. 62. See also Mnookin and Kornhauser, *supra* note 18,p.953

<sup>20</sup> Family Law Act 1996 s.8(2)

<sup>21</sup> *ibid.* s.29

<sup>22</sup> *ibid.* s.15(2)

<sup>23</sup> For various proponents of this theory see Day Sclater, S. (1999) *Divorce: A Psychosocial Study*, pp.17/18



Fletcher argues that family relationships, which he calls "relationships of loyalty", should be exempted from the state's regulatory power.<sup>24</sup> Whilst the arguments against state intervention have some weight and may be acceptable if the family is functioning, they carry with them a grave risk of abuse being perpetrated without check if a blanket exemption is applied. Deregulation, as Glendon points out, "may operate to shore up the traditional dominant position of men."<sup>25</sup>

Respect for private and family life will often ensure non-intervention by the State.<sup>26</sup> Non-intervention may be viewed as a value in itself.<sup>27</sup> However, in a sense non-intervention may be seen as a form of intervention. It may not be the neutral stance that it first appears to be since a decision not to interfere in, for example, a domestic violence situation may be to implicitly condone this abuse.<sup>28</sup> It must also be borne in mind that legal intervention is not the only form of state intervention, it can also include 'policing' families through social workers, health visitors and the like.<sup>29</sup>

### 1.3 The Risks Associated with Private Regulation.

Smart argues that the perception of marriage as a private contract between the parties masks the role of law and of public policy in ensuring the continued dependence of women on men.<sup>30</sup> By declaring certain social relationships as private and outside of the law, legitimacy or at least protection is afforded to the power balances within those relationships.<sup>31</sup> Within the context of the family this will often work to the detriment of women and children, with the family becoming a place of oppression outside of the reach of the law.<sup>32</sup> These arguments are persuasive. Respect for family life may mask abuse of children and women. However abolishing marriage will not alleviate the problem. The answer lies in offering better protection for those at risk whilst offering support where requested to those families where the members are not at risk of such abuse.<sup>33</sup> Somehow, Governments must find a balance between respecting the privacy of the functioning family and protecting vulnerable family members from abuse.

The Government claims to recognise that the public will only tolerate a certain amount of interference within their family lives. In his Foreword to *Supporting Families* the then Home Secretary, Jack Straw, acknowledges that families "do not want to be lectured or hectored, least of all by politicians."<sup>34</sup> The introduction goes on to state that "governments have to be wary about intervening in areas of private life and intimate emotion."<sup>35</sup> The document later states, "family matters are essentially private matters and individuals must live their own lives." Chapter 4 confirms, "it is not for the state to decide whether people marry or stay together,"<sup>36</sup> although the Government's clear preference for marriage and its commitment to supporting marriage is explicit.<sup>37</sup> The Government's position that they do not wish to interfere, they simply wish to support families in whatever practical way possible would

<sup>24</sup> Fletcher, G.P. (1996) *Basic Concepts of Legal Thought*. p.173.

<sup>25</sup> Glendon, supra note 16,p.86

<sup>26</sup> Archbold, C. (2000) Family Law Making and Human Rights in the United Kingdom in *Making Law for Families*, Ed., M. Maclean, p.191

<sup>27</sup> Eekelaar, J. *Family Law and Social Policy* supra note 15,p.190

<sup>28</sup> Herring, supra note 3 ,p. 15

<sup>29</sup> *ibid.* p.15

<sup>30</sup> Smart, C. (1984) 'Marriage, divorce, and women's economic dependency: a discussion of the politics of private maintenance,' in *State, Law and the Family: Critical Perspectives* edited by M.D.A. Freeman. See also Freeman, Critical Theory of Family Law, supra note 12, p.172/3

<sup>31</sup> Eekelaar, 'What is 'Critical' Family Law?' supra note 13,p.250

<sup>32</sup> Archbold, supra note 26,p.194

<sup>33</sup> Clark and Haldane, supra note 6, p.72 see also generally Dewar, J. 'The Normal Chaos of Family Law', supra note 6, pp.467-485.

<sup>34</sup> *Supporting Families*, supra note 4 ,p.2

<sup>35</sup> *ibid.* ,Introduction, para.4

<sup>36</sup> *ibid.*, para.4.7

<sup>37</sup> *ibid.*, para.4.8

seem, on the face of it, to be laudable. Day Sclater and Piper caution however that support may be a form of public intervention that masquerades as benign.<sup>38</sup>

The Government justifies intervention on the basis that whilst marriage and divorce are private matters, "they plainly have public consequences."<sup>39</sup> It is the economic and social threat to the community of family breakdown that provides the "classic precondition" for state intervention into what would otherwise be considered a private realm.<sup>40</sup> The traditional view of the family as a private sanctuary has been eroded by the emergence of the welfarist discourse that stresses the paramountcy of children's needs over all other issues, including the privacy of the family.

Eekelaar's entreaty to identify the public interest in need of protection rather than becoming engrossed in the largely illusionary distinction between the public and the private has much to recommend itself. If the family is functioning adequately then it should be, and largely is, left to regulate itself. However, if the family is in difficulty and in need of support, has broken down or family members are in need of protection then the public interest is such that the state should offer support to help save relationships or support on breakdown as required to ensure that the physical, emotional and economic consequences of divorce to the parties and the children are minimised.

## 2. The Wider Case Against Intervention.

### 2.1 The Impact of Family Change on the Acceptability of State Intervention.

A move from public intervention towards private ordering would reflect the profound changes in the nature and expectations of marriage in the closing decades of the 20<sup>th</sup> Century characterised in the shift from the more institutional aspects of marriage to what has been termed the companionate<sup>41</sup> nature of marriage where intimacy, sexual gratification and compatibility become more highly valued than the traditional economic security and provision of domestic services which typifies institutional marriage. Giddens has described this phenomenon as "the pure relationship" which he defines as a relationship "entered into for its own sake, for what can be derived by each person from a sustained association with another; and which is continued only in so far as it is thought by both parties to deliver enough satisfaction for each individual to stay within it."<sup>42</sup> Such relationships are by nature contingent although Giddens would argue not necessarily inherently selfish for they have served, in his view, to render family relationships more democratic.<sup>43</sup> He argues that this "transformation of intimacy" is closely linked to the ascendancy of individualism and autonomy.<sup>44</sup> The full implications of how the modern transformation of intimate relationships may affect the ability of law to influence behaviour will be explored fully in Chapter 3 below. For the present purposes the transformation must call into question the extent to which governments ought to intervene within marriages when those marriages no longer fulfil the much more rigorous demands of companionate rather than institutionalised marriage. The dilemma facing governments is whether they should accept greater individualisation and autonomy of decision making within families or should they try to support more traditional

<sup>38</sup> Day Sclater, S. and Piper, C. (2000) 'Re-moralising the family? – family policy, family law and youth justice, *C.F.L.Q.R.*, vol. 12, No.2, p.142

<sup>39</sup> *Supporting Families*, supra note 4, para.4.9

<sup>40</sup> Eekelaar, J. (1990) *Regulating Divorce*, p.44

<sup>41</sup> See Day Sclater, *Divorce: A Psychosocial Study*, supra note 23, p.12 and also Reynolds, J. and Mansfield, P. (1999) 'The Effect of Changing Attitudes to Marriage on it's Stability', in *High Divorce Rates: The State of the Evidence on Reasons and Remedies* (Lord Chancellor's Department), vol.1 Paper 3, p.3 (although Reynolds and Mansfield caution against simply categorising a marriage as either institutional or companionate since differing marriages will have differing variations depending on class, religion and ethnic group and even individual marriages will show variations depending on the phase of family life they are in, p.4)

<sup>42</sup> Giddens, A. (1992) *The Transformation of Intimacy*, p.58

<sup>43</sup> *ibid.* p.188

<sup>44</sup> *ibid.* p.185

family forms and, if so, how invasive should that support be? It must be a question of balance. Given the economic and personal cost of marriage breakdown outlined below it must be justifiable to offer support and counselling *where requested* to couples with the aim of helping them to rediscover some of that lost intimacy and for the marriage to once again satisfy the hopes and needs of the parties.

## 2.2 The Feminist Perspective.

Many feminists would resist the supporting of marriage, arguing that marriage is paternalistic and that the traditional gendered roles within marriage ensure that women continue to be subordinated to men. The support of marriage and the 'protection' of 'vulnerable' women on marriage breakdown may be said to perpetuate this subordination.

In the 1960's and 1970's it was not uncommon for feminists to see the family as the "primary locus for women's oppression"<sup>45</sup> O'Donovan cites Smart as favouring the abolition of marriage, which Smart views as oppressive to women. Smart advocates instead the replacement of marriage by individual contracts. O'Donovan quotes Pateman as viewing marriage as "contaminated by patriarchal meaning and mastery." Pateman is however opposed to its replacement by contract as she views this as also patriarchal.<sup>46</sup> Lewis cites Kingdom as favouring cohabitation contracts to provide women with a realistic alternative to marriage.<sup>47</sup>

O'Donovan sees marriage laws as a form of "repressive benevolence" and as "a means of control in the guise of protection." She sees the requirement that women surrender their autonomy within marriage in return for protection as a serious cause for concern.<sup>48</sup>

Carbone stresses that the influence of gender is pervasive in both marriage and divorce and that it is essential to take its influence into account in the formulation of public policy to ensure that women's interests are adequately protected.<sup>49</sup> Lloyd argues that "it is the codification and organisation of the world into gendered hierarchies that constructs women's oppression under patriarchy,"<sup>50</sup> and that therefore any opportunity to undermine gender norms has its appeal to the feminist. Lloyd suggests that Foucault's "politics of refusal" as outlined in *'The Subject and Power'* may provide a solution for women. Foucault advocates that women should "refuse what they are" thus rejecting the normativised identity society has placed upon them, creating for themselves a new subjectivity.<sup>51</sup> Foucault does however recognise the limits to this, accepting that "self-transformation always occurs within certain parameters;..... There is choice, but not unlimited choice; the field of possibility is always already partially constituted."<sup>52</sup> Whilst there may be theoretical appeal in Foucault's ideal of the creation of a new subjectivity, unless this is accompanied by tangible change in the practicalities in which women's lives are conducted the choices available to women to embrace the transformation which Foucault advocates are likely to remain limited.

Whilst there has undoubtedly been significant advances in the Women's Movement and their demands for equality between the sexes since the 1970's it is nevertheless the case that the division of labour within marriage, especially after the birth of children, continues to be largely along traditional gendered lines. Whilst a greater percentage of women are taking up paid employment there has not been a corresponding increase in the shouldering of

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<sup>45</sup> Bainham, A., Day Sclater, S. and Richards, M. (1999) (eds.) *What is a parent – a socio-legal analysis*. p.7

<sup>46</sup> O'Donovan, *Family Matters* supra note 2, p.49

<sup>47</sup> Lewis, supra note 17, p.179.

<sup>48</sup> O'Donovan, K. (1984) 'Marriage- Sacred Union or Determinable Contract?' in M. Freeman (ed) *State, Law and the Family. Critical Perspectives*. pp.85/86

<sup>49</sup> Carbone, J. 'Feminism, Gender and the Consequences of Divorce.' in M. Freeman (ed) *State, Law and the Family. Critical Perspectives*, p.181

<sup>50</sup> Lloyd, M. A. *Feminist Mapping of Foucauldian Politics* p.254

<sup>51</sup> Ibid p.243

<sup>52</sup> Ibid. p.246

domestic and child-care responsibilities by their partners with the result that marriage has become possibly even more repressive to women. This is not however sufficient cause to abandon marriage or governmental support for marriage. To do so would not relieve the situation for women and would deny them the greater protection currently offered to spouses over cohabitants in the event of relationship breakdown. There is still significant public support for the institution of marriage<sup>53</sup> and it remains the family form of choice for the majority. In those circumstances the needs of women may be better served by providing marital support to those who want and require it whilst developing more flexible employment policies for both men and women to encourage a more egalitarian division of labour to ease the burden on women. Until either a more egalitarian division of childcare is achieved or more family friendly workplaces created to make it viable for those women who wish to regain financial independence on divorce to do so then financial support will be needed.

### 2.3 The Idealisation of Marriage

Traditionally family law has meant, almost exclusively, the law pertaining to marriage. Marriage is, as Eekelaar puts it, "the epicentre" around which family law revolves.<sup>54</sup> Marriage confers status.<sup>55</sup> It is a "very powerful signifier"<sup>56</sup>, and whilst not now perhaps the rite of passage into adulthood that it once was, its hold on the imagination of both the individual and government as the ideal family form remains strong. It has material benefits, and whilst the personal taxation benefits have been eroded in recent years, marriage remains beneficial in terms of inheritance law. It is recognised and approved as the preferred family form socially. It has advantages in terms of rights of succession, property rights on divorce and confers automatic parental responsibility for men. O'Donovan observes, "[a]s the place of idealised intimacy, security, sexuality and stability, marriage remains the primordial model of personal relations."<sup>57</sup>

The explicit support given to marriage as embodied in the "principles" set out at the commencement of the FLA<sup>58</sup> and the support given to marriage as the Government's preferred family form in *Supporting Families*<sup>59</sup> underscores the view that divorce is undesirable and potentially damaging, potentially pathologising divorce and compounding the sense of failure for those who fail to attain what Clulow describes as the "gold star"<sup>60</sup> aim of the FLA, namely reconciliation.

For her study on status passage following the ending of marriage, Hart collected detailed case material on 63 men and women from a club for the divorced and separated over a two-year period. Those she interviewed reported feelings of exclusion and marginalisation.<sup>61</sup> She reports that "Marital breakdown was viewed with apprehension and guilt, with a sense of failure, rejection, and defeat, as abnormal and freakish, in short with a sense of utter dismay"<sup>62</sup> and was viewed by her sample as synonymous with social failure. Whilst the stigma attached to divorce has undoubtedly reduced since Hart carried out her study, there is nevertheless overwhelming evidence that divorce causes profound emotional turmoil for those affected by it.<sup>63</sup> Day Sclater points to the overwhelming feelings of loss together with the material deprivations and significant practical changes which usually accompany divorce

<sup>53</sup> see 3.2 below

<sup>54</sup> Eekelaar, *Family Law and Social Policy* supra note 15, p.4

<sup>55</sup> Dewar, 'Family Law and its Discontents', supra note 7, p.62

<sup>56</sup> Day Sclater, S. and Piper C. (1999) 'The Family Law Act 1996 in Context', in S. Day Sclater and C.Piper (eds.) *Undercurrents of Divorce*, p.10

<sup>57</sup> O'Donovan, *Family Matters* supra note 2, p.49

<sup>58</sup> Family Law Act 1996, s.1(a) and (b)

<sup>59</sup> *Supporting Families*, supra note 4, Para. 4.3

<sup>60</sup> Clulow, Dr C. (2000) 'Supporting Marriage in the Theatre of Divorce', in Thorpe, The Rt. Hon. Lord Justice and E. Clarke (eds.) *No Fault or Flaw The Future of The Act*, p.20

<sup>61</sup> Hart, N., (1976) *When Marriage Ends: a Study in Status Passage*. p.36

<sup>62</sup> *ibid.* p.109

<sup>63</sup> see 3.3 below.

and notes that for many trying to come to terms with the enormity of divorce, their recovery is made that much more difficult by dominant discourses which idealise 'intact' families whilst pathologising families which breakdown.<sup>64</sup> This is an important point. There is certainly a risk that the pervasive "saving saveable marriages" discourse may exacerbate the sense of failure for those whose marriage ultimately ends in divorce but this is not in itself sufficient reason for the Government to decline to take steps to save those marriages capable of being saved. Indeed it may provide some justification for intervention in order to prevent others suffering the misery described above.

## 2.4 Human Rights Implications

At a constitutional level, the right to privacy has become "a standard figure in the pantheon of basic human rights."<sup>65</sup> Articles 8(1) and 8(2) of the European Convention on Human Rights provide a guaranteed minimum right to respect for private and family life with which the State is prohibited from interfering unless it is justified on grounds of public policy. The Human Rights Act 1998, which came into force in 2000, incorporates the European Convention on Human Rights into UK law for the first time. All decisions of the judiciary must now take convention rights into consideration<sup>66</sup> and, significantly, when any reform of the existing law is being contemplated, an explicit declaration must be made in Parliament confirming that any new statute complies with Convention Rights.<sup>67</sup> The Human Rights Act does not however prevent intervention, it simply restricts it to cases where intervention is justified for public policy reasons which should in any event be the only time the Government intervenes.

## 3. The Wider Case For Intervention.

### 3.1 The Rise of Divorce Rates.

The rising divorce rates, in particular since the 1970's have caused alarm amongst commentators. Morgan, for example states with passion, "[d]ivorce is a great destroyer that is eating the heart out of society as well as savaging children's lives."<sup>68</sup> Whether this is so will be examined in detail below. What is undoubtedly so is that there have been fundamental changes in the structure of the family over the last three decades in particular. The numbers of those marrying has declined and the average age at marriage increased whilst the divorce rate, rate of cohabitation, numbers of children born out of wedlock and rate of remarriage have all risen sharply throughout the western world.

In 1971 there were 74,000 divorces. The numbers increased rapidly, peaking in 1993 at 165,000 and subsequently falling to 145,000 by the end of the 1990's.<sup>69</sup> In 1998 nearly 71 percent of divorces were the first divorce for both parties, with nearly 20% of divorcees in that year having been divorced previously.<sup>70</sup> Whilst the UK's marriage rate per 1000 of the population is around the European Union average, at 5.1, the rate of divorce is significantly higher. The EU average is 1.9 per 1000 whereas the UK's rate is 2.6. Only Denmark and Belgium have higher rates at 2.7 and 2.9 respectively.<sup>71</sup>

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<sup>64</sup> Day Sclater, S. (1999) 'Experiences of Divorce', in S. Day Sclater and C. Piper (eds.) *Undercurrents of Divorce*, p.163.

<sup>65</sup> Fletcher, *supra* note 24, p.173/4

<sup>66</sup> Human Rights Act 1998, s.6

<sup>67</sup> *ibid.* s.19

<sup>68</sup> Morgan, P. (1995) 'Conflict and Divorce: Like a Horse and Carriage?' in R. Whelan (Ed) *Just a Piece of Paper? Divorce Reform and the Undermining of Marriage*, p.32

<sup>69</sup> Rodgers, B. and Pryor, J. (1998) *Divorce and Separation: the outcomes for children*. Joseph Rowntree Foundation, pp.5-6

<sup>70</sup> *ibid.* p.6

<sup>71</sup> Office of National Statistics (2003) *Social Trends No. 33*, p.48

Whilst the numbers of divorces has fallen over the last decade this may in part simply be a reflection of the fewer numbers choosing to marry. The numbers are nevertheless almost double what they were three decades ago. The effects of divorce on the adults and children involved as outlined below together with the cost to the public purse give the Government arguably not only justification but also an obligation to develop policies to support marriage and help reverse the trends shown above.

### 3.2 The Public Commitment to Marriage.

The fact that there is majority public support for the institution of marriage and for marriage support boosts the Government's case in favour of offering support. Majority public support for marriage has been shown consistently in the annual British Social Attitudes Surveys. The 1987 survey found that more than two thirds of the respondents supported the notion that, "as a society we ought to do more to safeguard the institution of marriage", with only 6% disagreeing.<sup>72</sup> The 2001/2 Report found considerable support for marriage as an ideal with only 9% dismissing it as "just a piece of paper" and nearly six in ten still thinking it is the best kind of relationship.<sup>73</sup> Melton points to the commonly expressed view that family relationships are the most important aspect of people's lives, citing remarriage rates and the vehemence of the debates concerning family law and its reform as evidence of the centrality of family in the lives of the general population.<sup>74</sup> The level of public commitment to marriage arguably justifies public intervention to support it.

### 3.3 The Effect of Divorce on Adults.

Study after study has shown that marital breakdown can have a profound effect on the physical and mental health of those affected. Governments, Health Organisations and interested pressure groups would argue that the effect of divorce and separation on society is so enormous that the Government has a duty to intervene and do what it can to mitigate its adverse effect on the health of the nation. McAllister, in the seminal work, *Marital Breakdown and the Health of the Nation* argues forcefully that "the links between marriage and health are strong."<sup>75</sup>

Whilst the White Paper which preceded the FLA did not explicitly refer to physical health, it did recognise that "the social, economic and emotional costs (of divorce) are considerable."<sup>76</sup> The physical and emotional cost of relationship breakdown and the "key" part that stable relationships and families play in the maintenance of a healthy society is also recognised in *Moving Forward Together*.<sup>77</sup>

Significantly, almost every study of mortality and marital status in every country for which accurate health statistics are available shows that the unmarried have higher death rates.<sup>78</sup> Divorced men are approximately twice as likely to die of heart disease than married men.<sup>79</sup> The divorced population has higher rates of cancer and significantly worse recovery rates

<sup>72</sup> Day Sclater, S. (1999) *Divorce: A Psychosocial Study*, supra note 23, p.11

<sup>73</sup> Barlow, A., Duncan, S., Evans G., and Park, A. (2002) 'Just a piece of paper- marriage and cohabitation in Britain', *British Social Attitudes Survey: Public Policy, Social Ties, 18<sup>th</sup> Report, 2001/2 Edition*, Chapter 2, National Centre for Social Research, News Report.

<sup>74</sup> Melton, G.B. (1995) in G.B. Melton (ed.) 'Personal Satisfaction and the Welfare of Families, Communities and Society.' *The Individual, the Family, and Social Good: Personal Fulfilment in Times of Change*. Vol 42 of the Nebraska Symposium on Motivation, p. xviii-xix

<sup>75</sup> McAllister, F. (ed.) (1995), *Marital Breakdown and the Health of the Nation*, 2nd ed One Plus One, U.K, p.6 See also Hale, supra note 7, p. 133

<sup>76</sup> Looking to the Future: Mediation and the Ground for Divorce: The Government's Proposals, (1995) Cm 2799, Para. 1.9

<sup>77</sup> *Moving Forward Together* supra note 5, p.9-10

<sup>78</sup> McAllister, supra note 75, p.6 See also Morgan, supra note 68, p.25

<sup>79</sup> *ibid.* p.23

from cancer than those who are married.<sup>80</sup> The divorced and separated are also more prone to death from accidents.<sup>81</sup>

The divorced are generally twice as likely to be hospitalised than their married counterparts.<sup>82</sup> The divorced and separated are also approximately 35 percent more likely to consult their GP.<sup>83</sup> Divorced or widowed men are twice as likely to consult their GP for mental disorders and divorced or widowed women one and a half times as likely.<sup>84</sup> The admission rate of the divorced to a psychiatric unit or mental hospital is up to ten times that of married individuals.<sup>85</sup> Caution must be exercised in interpreting this data however as it is unclear how far these conditions may have preceded and helped cause the breakdown, rather than purely being a symptom of the breakdown. Marital status was found to be the most important predictor of depression in a survey where respondents were questioned as to whether they had "ever suffered from severe depression or other nervous illness." The divorced or separated were most likely to confirm that they had and the single least likely.<sup>86</sup>

Recurring themes for the separated interviewed by Hart were their feelings of loneliness and loss of control over their life, feelings of uncertainty, inability to perform everyday tasks such as cooking, suicidal feelings, feelings of insecurity, loss of faith in others and a general meaninglessness of existence, with feelings of unreality.<sup>87</sup>

The divorced and separated are far more likely to attempt to or actually commit suicide, with one study showing that divorced men are five times more likely to commit suicide than unmarried men and that divorced women are three times more likely than unmarried women.<sup>88</sup> Other studies have placed the risk at approximately four times greater.<sup>89</sup> Whichever is more accurate, the differences are significant.

Divorced and separated men are more likely to smoke, and to be heavy smokers, than any other marital status group. Divorced women are more likely to smoke than married women (although they are less likely to smoke than single women.)<sup>90</sup> Divorced and separated men are more likely to be heavy drinkers, than any other marital status group, with 14% drinking in excess of 51 alcoholic units per week compared to only 4% of married men.<sup>91</sup> Analysing hospital admissions, death from cirrhosis of the liver and police arrest records as measures of potential alcoholism, reveals that it is most common amongst the divorced and separated.<sup>92</sup> Divorced adults also have higher rates of substance abuse than their married counterparts.<sup>93</sup>

Perhaps not surprisingly, given the stress and emotional turmoil of divorce and separation, the ability to effectively parent has been shown to diminish in the first year following separation. While there is a significant improvement in the second year onwards, divorced mothers and their children continue to display greater parent-child problems than those from intact families.

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<sup>80</sup> *ibid.* p.20

<sup>81</sup> *ibid.* p.23. For possible reasons for this see *ibid.* p.23

<sup>82</sup> *ibid.* p.20

<sup>83</sup> *ibid.* p.9

<sup>84</sup> *ibid.*

<sup>85</sup> *ibid.*

<sup>86</sup> Day Sclater, *Divorce: A Psychosocial Study*, *supra* note 23, p.84

<sup>87</sup> Hart *supra* note 61, p. 190-193

<sup>88</sup> *ibid.* p. 18

<sup>89</sup> *ibid.* p.21

<sup>90</sup> *ibid.* p.14

<sup>91</sup> *ibid.*

<sup>92</sup> *ibid.* p.18

<sup>93</sup> Rodgers and Pryor, *supra* note 69, p. 49

Jessop, relying on Bursik, argues that, particularly for women, the coping strategies developed and the ability to 'master' the situation may mean that divorce, whilst stressful, can lead to opportunities for increased growth and development.<sup>94</sup> Whilst this might undoubtedly be the case for some, the overwhelming evidence as outlined above is that the divorced and separated, in particular divorced and separated men, are more likely to suffer premature death and mental health problems, commit suicide, smoke, drink and abuse substances more frequently than their married counterparts. The misery this causes to the affected person and their families as well as the strain it places on Health Service costs are strong justifications in favour of state intervention to prevent relationship breakdown.

### 3.4 The Effect of Divorce on Children.

Perhaps the most cogent argument in favour of state intervention within the family is the need to safeguard the interests of children caught up in divorce. As Szwed puts it, "society's vested interest in ensuring the proper nurturing of its future adult members means that this branch of family law provides the greatest potential for state interference and control of family life."<sup>95</sup>

In 2000 the parents of 142,457 children under 16 and a further 57,591 over 16, divorced.<sup>97</sup> On recent trends it is estimated that 19% of children born to married couples will experience parental divorce by the age of 10 and 28% by age 16.<sup>98</sup> Furthermore from 1991 figures, it has been estimated that 5.5% of all children will become stepchildren of a married couple and 6.7% will become stepchildren of a cohabiting couple before their 16th birthday.<sup>99</sup> In 2000/1 stepfamilies accounted for 8% of families with dependant children in Great Britain.<sup>100</sup>

In spring 2002 around one fifth of dependant children in Great Britain lived in lone parent families – almost twice the proportion of 1981.<sup>101</sup> These figures confirm that huge numbers of children will be affected by the breakdown of their parent's marriage justifying state intervention given the consequences outlined below.

It is universally assumed that the upbringing of a child within a family setting provides the optimal environment for the child's development. Studies, not surprisingly, have shown that children raised within family settings fare better than those raised in a residential setting.<sup>102</sup> The Government has stated explicitly in *Supporting Families*, that its preferred "family setting" would be within marriage. Not surprisingly, when questioned most children indicated that they would have preferred their parents not to have separated.<sup>103</sup>

The detrimental effect of parental divorce on children has been widely documented. Reviewing seven different UK studies carried out between 1986 and 1998 comparing the educational attainment of children from separated families with those from intact families, Rodgers and Pryor conclude, "Performance on educational measures were significantly lower for children from separated families in all studies and the size of effect is generally greater in the case of formal qualifications."<sup>104</sup> They do however qualify this by stating that

<sup>94</sup> Jessop, J. (1999) 'The Psychology of Divorce: A Review of the Literature' in Day Sclater, S. *Divorce: A Psychosocial Study*, p.91

<sup>95</sup> Szwed, E. (1984) 'The Family Court,' in *State, Law and the Family: Critical Perspectives* edited by M.D.A. Freeman, p.267

<sup>96</sup> For a discussion on how far children rights and the dominant welfare discourse ought to shape formulation of family policy see James, A. and Richards, M. (1999) 'Sociological perspectives, family policy, family law and children: Adult thinking and sociological tinkering', *J.S.W.F.L.*, vol. 21(1), p.36.

<sup>97</sup> Office of National Statistics, *Marriage, divorce and adoption statistics, 2000*, Series FM2 no.28, Table 4.10

<sup>98</sup> Rodgers and Pryor, supra note 69,p4.

<sup>99</sup> *ibid.* p.35

<sup>100</sup> Social Trends No. 33, supra note 71, p.48

<sup>101</sup> *ibid.*, p.43

<sup>102</sup> Eekelaar, *Family Law and Social Policy*, supra note 15 ,p.190

<sup>103</sup> Gibson, C.S., (1994) *Dissolving Wedlock*, p.141

<sup>104</sup> Rodgers and Pryor, supra note 69,p.25.



many, although not all, of the differences in educational attainment disappear when socio-economic factors are adjusted for and it may be the lower socio-economic position often resulting from separation, which accounts for much of the lower educational performances.<sup>105</sup> Older children from stepfamilies have been found to fare particularly badly, being more likely than those from lone parent families to leave school at age 16 with no qualifications.<sup>106</sup>

Allied to poor educational performance is the poorer employment position of those from divorced and separated families. Wadsworth and Maclean (1986) drawing on data provided by a national birth cohort study of all children born in one week in 1946 found that, by the time they were 36, men in the study who had experienced parental divorce in childhood were twice as likely to be unemployed or in the lowest income group than those from intact families whereas those who had suffered the death of a parent in childhood were no more likely to be unemployed and only slightly more likely to be in the lowest income group.<sup>107</sup>

Studies have consistently shown that those who experienced parental divorce during childhood are also more likely themselves to divorce.<sup>108</sup> Wadsworth and Maclean found that at age 36 women whose parents had divorced were twice as likely to have been married more than once than those from intact families.<sup>109</sup> Rodgers and Pryor refer to this as "intergenerational transmission." This intergenerational aspect of divorce boosts the case for governmental intervention to prevent the likelihood of divorce increasing down the generations.

The Wadsworth and Maclean study also found that at age 36 women whose parents had divorced were more likely to suffer mental health problems and alcoholism.<sup>110</sup> Parental divorce has been found to be a risk factor for adult depression, suicidal behaviour and anxiety disorders. Adults from separated families are twice as likely to suffer depression at clinically significant levels as adults from intact families.<sup>111</sup>

Studies have consistently shown that children brought up in households where the parents divorce are more likely to display anti-social and delinquent behaviour than those in intact families particularly within the first two years following separation and this is especially so for boys.<sup>112</sup> Those in step-families have even worse results and are more likely to show deviant behaviour at age 16 (in step-mother families) and to have more contact with the police (girls in step-father families) compared to those from lone-parent families.<sup>113</sup>

Studies have tended to show that those brought up in intact families until the age of 16 have higher levels of life satisfaction and more family support, fewer psychological problems and less conflict at every age.<sup>114</sup> Even after adjustment for poorer socio-economic circumstances children from separated families manifest greater levels of distress and unhappiness, including bedwetting, worrying, and neurotic and difficult behaviour.<sup>115</sup> They are likely to receive less adult attention and are more likely to have erratic meal times and bedtimes and to be late for school.<sup>116</sup> They are more likely to leave home and school at an early age and

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<sup>105</sup> *ibid.*

<sup>106</sup> *ibid.* p.35

<sup>107</sup> Eekelaar, *Regulating Divorce*, *supra* note 40, pp.46/7

<sup>108</sup> Rodgers and Pryor, *supra* note 69, p.29

<sup>109</sup> Eekelaar, *Regulating Divorce*, *supra* note 40, pp.46/7

<sup>110</sup> *ibid.*

<sup>111</sup> Rodgers and Pryor, *supra* note 69, p.29

<sup>112</sup> *ibid.* p.21. See also Maidment, S. (1984) 'The Matrimonial Causes Act, s. 41 and the children of divorce: the theoretical and empirical considerations' in *State, Law and the Family. Critical Perspectives* edited by M.D.A. Freeman, p.161

<sup>113</sup> *ibid.* p.35

<sup>114</sup> Lord Chancellor's Department. (2002) *Moving Forward Together. A Proposed Strategy for Marriage and Relationship Support for 2002 and Beyond*, Advisory Group on Marriage and Relationship Support. P.9

<sup>115</sup> Rodgers and Pryor, *supra* note 69, p.23

<sup>116</sup> Maidment, *supra* note 112, p.169

engage in early sexual activity, pregnancy, ex-nuptial births, parenthood and partnership.<sup>117</sup> They are more likely to smoke or engage in illicit drug use,<sup>118</sup> are more likely to experience accidents and be admitted to hospital, are reported to have more health problems and are more likely to visit GPs than those in intact families.<sup>119</sup> They are at greater risk of family violence and of being physically or sexually abused<sup>120</sup> and, particularly for girls, have a poorer self-image than children from intact families.<sup>121</sup>

Children are disproportionately present in low-income households, with 21% of children (2.7million) living in households with below 60% of median income (before deduction of housing costs) in Great Britain in 2001. This figure reaches 4 million if housing costs are deducted. Since lone parent families now account for just under 20% of all families and 60% of these are reliant on income support,<sup>122</sup> it is clear that a significant number of those children living in poverty will be doing so partly as a result of divorce.

Eekelaar, quoting the research of Wallerstein and Kelly (1980), notes that five years after the separation of their parents 34% of the children appeared to be doing especially well, but that 37% were "consciously and intensely unhappy and dissatisfied with their life in the post divorce family" and "moderately to severely depressed," while the rest demonstrated "adequate but uneven functioning."<sup>123</sup> More recently Hetherington and Kelly found that "80% of children from divorced homes eventually are able to adapt to their new life and become reasonably well adjusted".<sup>124</sup> The remaining 20% were however described as "troubled", with the highest academic dropout rates, highest divorce rates and comparatively low economic status. 10% of those from intact (but usually high conflict) families were described as "troubled."<sup>125</sup>

Caution must be exercised in attributing all of the above adverse consequences exclusively to the separation itself. Other factors such as poverty (both before or as a result of separation) or social class may be just as influential as parental separation in causing the poor results recorded for the children involved.<sup>126</sup> Rodgers and Pryor point to the range of other factors such as levels of conflict and poor parent-child relationships which can effect the results.<sup>127</sup> Their examination of the relevant studies in this area confirms that recovery is most effective for children whose parents' marriage and post separation relationship is the least acrimonious.<sup>128</sup>

What is clear, from the studies outlined above, is that children suffer a range of adverse outcomes following separation of their parents, which can, in some instances, persist, into adulthood. Whilst the impact of divorce can be mitigated with sensitive handling of the child's emotions during and after separation and by minimising the child's exposure to parental conflict pre- and post-separation it is unlikely that any child will be asymptomatic following divorce. The adverse consequences for children following divorce provide cogent grounds for government intervention.

<sup>117</sup> Rodgers and Pryor, *supra* note 69, p.29

<sup>118</sup> *ibid.*

<sup>119</sup> *ibid.*

<sup>120</sup> *ibid.* p.49

<sup>121</sup> Poussin, G. and Martin-Lebrun, E. (2002) A French Study of Children's Self-esteem after Parental Separation. *I.J.L.P.F.* 16, 320

<sup>122</sup> Walker, J., Timms, N. and Collier, J. (2001) 'The Challenge of Social, Legal and Policy Change' in *Final Evaluation Report*, p. 7

<sup>123</sup> Eekelaar, *Family Law and Social Policy* *supra* note 15, p.66

<sup>124</sup> Hetherington, E.M. and Kelly, J. (2002) *For Better or For Worse, Divorce Reconsidered*, p.228

<sup>125</sup> *ibid.*

<sup>126</sup> Maidment, *supra* note 112, p.176

<sup>127</sup> Rodgers and Pryor *supra* note 69, p. 34

<sup>128</sup> *ibid.* p.49. For details of relevant studies see Eekelaar, *Family Law and Social Policy*, *supra* note 15, p.67 and 69 and the Exeter Family Study quoted in Morgan, *supra* note 68, p.29

### 3.5 The Effect of Divorce on the Public Purse.

As well as the physical and emotional costs to adults and their children, divorce also puts a huge strain on the public purse. In his report to the Lord Chancellor on the funding of marriage support in 1999 Sir Graham Hart indicated that in 1994 such costs were estimated to be between £3.7bn and £4.4bn a year. This included an estimated £3bn to £3.7bn on social security spending together with the cost of legal aid, social services, tax allowances and NHS treatment. The cost in legal aid alone was £300m in 1993-4, and this had risen to £468m by 1997/98. Hart therefore estimated that as at 1999 public spending caused by family breakdown was running at about £5 billion a year.<sup>129</sup> *Moving Forward Together* points out that the costs may in fact be substantially higher than this, but that precise figures are difficult to quantify.<sup>130</sup> Field suggests that the cost of supporting on benefit families who have separated is 5p in the pound of income tax.<sup>131</sup>

Divorce also puts pressure on both public and private housing, as one unit becomes two. It places an extra burden on both the public and private sector in funding the judiciary and support services such as Relate, the Council for One Parent Families etc. As more and more of the divorced go on to establish second families, inevitably the wage earner's income may not stretch to cover two households with the consequence that both households may end up in receipt of income support or Working Families Tax Credit. Lone parent families now account for just under 20% of all families and 60% of these are reliant on income support.<sup>132</sup>

The problem of divorce today may also be storing up public expenditure consequences for the future as those who do not form an alternative relationship will be denied the support an older couple may have given each other, thus potentially making that person reliant on state support to meet their physical needs earlier than might otherwise have been the case. Divorce also has an effect on the wider kin network. It is projected that the population will contain 2 ½ million women aged 75 or more by 2021.<sup>133</sup> Both the community and governments have seen daughters and daughters-in-law as the traditional carers of their ageing mothers and mothers-in-law but divorce is likely to impact upon this.

### 3.6 The Impact of Marriage on Social Stability.

The family, rather than the individual, has traditionally been seen as the bedrock of society. The married couple has been viewed, as Lewis puts it, as "the polis in miniature", a place of discipline and order.<sup>134</sup> It is clear from *Supporting Families* that the current Government views properly functioning families, preferably marriages, as promoting social stability. The Government has endorsed the findings of *Moving Forward Together* which views stable relationships and families as "key to a healthy society."<sup>135</sup> They are believed to reduce juvenile delinquency and crime, a belief which would appear to be borne out by the data outlined above.<sup>136</sup> Supporting marriage is thought to increase the welfare of individual members as well as benefiting society as a whole. Freeman suggests that the unity of the family is important to the state because children learn conformity and obedience within families which helps mould submissive citizens.<sup>137</sup> If family stability promotes social stability and is therefore a social good then marriage breakdown must be a social evil.<sup>138</sup> It follows

<sup>129</sup> Hart, Sir G. (1999) *The Funding of Marriage Support: A Review*, Lord Chancellor's Department, Para. 9.

<sup>130</sup> *Moving Forward Together* supra note 5, p. 10

<sup>131</sup> Quoted in Herring, supra note 3, p.77

<sup>132</sup> see note 122 above.

<sup>133</sup> Gibson supra note 103, p. 148

<sup>134</sup> Lewis, 'Marriage and Cohabitation Debates' supra note 17, p.161

<sup>135</sup> *Moving Forward Together* supra note 5, p.2

<sup>136</sup> see note 112 above

<sup>137</sup> Freeman, *Critical Theory of Family Law*, supra at note 12, p.171

<sup>138</sup> Rheinstein, M. (1972) *Marriage Stability, Divorce and the Law*, p.276

therefore that the Government should do what it can to support marriage to prevent this "social evil."

#### 4. Should the Government's Intervention be Restricted to Marriage?

In 1971 459,000 marriages took place in the UK.<sup>139</sup> By 2001 the number had dropped to 286,100<sup>140</sup>, a reduction of almost 38%.

In Great Britain in 2000/1 a quarter of non-married adults aged 16-59 were cohabiting.<sup>141</sup> The rate is predicted to rise to nearly 3 million by 2021.<sup>142</sup> The majority of people now cohabit before marriage. In 2000, 201,476 or 75.2% of those who married out of a total of 267,961 gave an identical residential address immediately before marriage.<sup>143</sup>

In 2001 40% of births in the UK occurred outside of marriage. The parents jointly registered three quarters of these, and of those jointly registering three quarters gave identical addresses.<sup>144</sup> These figures reveal a fundamental change in the way private relationships are conducted which the Government cannot ignore in its formulation of family policy.

If the adverse effect on children of parental separation is sufficient to justify state intervention in an otherwise private arena one must question whether a marriage saving agenda is the best way of securing the needs of children. Given that in 2001 40% of children were born outside of marriage,<sup>145</sup> ought not the Government to be attempting to make all parental relationships more stable, married or cohabiting?

Using recent empirical research on the views of thirty mothers with pre-school children (11 married, 11 cohabiting and eight lone mothers) on marriage and cohabitation, Barlow and Duncan conclude that the Government has misunderstood the ways in which people make decisions about partnering and hence misplace the role of family law making, which they term, a "rationality mistake."<sup>146</sup> They argue that *Supporting Families* fails to recognise, yet alone address the need for better family law-based regulation of cohabitation relationships.

The Government's clear preference for marriage is evidenced by the fact that only approximately 6 of the 49 paragraphs of *Supporting Families* have much relevance to cohabiting parents and only three consider them directly. The Government justifies its position by saying that, "research" has shown that "there is a higher level of commitment between married couples than between those who cohabit; and married couples are more likely to stay together."<sup>147</sup> There is certainly some evidence that married relationships are more durable than cohabiting relationships<sup>148</sup> although the same relationship may have broken down whether or not the parties had married. Lewis would argue that the nature of the commitment between married and cohabiting couples is different but that the commitment of the married is not necessarily superior.<sup>149</sup> Those interviewed by Barlow and Duncan did not see marriage as superior in terms of parenting.<sup>150</sup> Given Lewis's

<sup>139</sup> Clark and Haldane, *supra* note 6, p.31

<sup>140</sup> National Statistics Office, News Release, *Marriage in Decline*, 29<sup>th</sup> April 2003.

<sup>141</sup> Social Trends, *supra* note 71, p.45

<sup>142</sup> Walker, Timms, and Collier, *supra* note 122, p.7

<sup>143</sup> Office of National Statistics, Series FM2 no.28, *supra* note 97, Table 3.41

<sup>144</sup> *ibid.* p.50

<sup>145</sup> see note 23 above.

<sup>146</sup> Barlow, A and Duncan, S. (2000) 'Supporting families? New Labour's communitarianism and the 'rationality mistake': Part 2', *J.S.W.F.L.*, vol. 22(2), p.129

<sup>147</sup> Straw, J. Speech made in July 1998 to launch the National Parenting and Family Institute quoted in Barlow and Duncan, *supra* note 194, p.134

<sup>148</sup> See for example Barlow and Duncan, *supra* note 146, p.134, Reynolds and Mansfield, *supra* note 41, p.15-16, Clarke, L. and Berrington, A. (1999) 'Socio-demographic Predictors of Divorce' in *High Divorce Rates: The State of the Evidence on Reasons and Remedies* (Lord Chancellor's Department), vol.1 Paper 1, p.7 and Moving Forward Together *supra* note 5, p.15.

<sup>149</sup> Lewis, J. (1999) "Marriage and cohabitation and the nature of commitment" *C.F.L.Q.R.*, Vol. 11, No 4, p.363

<sup>150</sup> Barlow and Duncan, *supra* note 146, p.197. See also *British Social Attitude Survey 2001/2*, *supra* note 96

findings Day Sclater and Piper make a timely and much needed call on the Government to adopt a more "nuanced" approach to family policy to take into account the changing nature of family formation.<sup>151</sup>

The figures outlined above show that huge numbers of children are living with both their unmarried parents. In those circumstances, if one were to accept that the welfare of children is sufficient to justify the Government's paternalistic stance with respect to intimate relationships, then why shouldn't support extend to all parenting arrangements? If the statistics are correct and cohabiting relationships are more vulnerable than marriage does this not justify more rather than less support for cohabitants, given that this is the choice of relationship for the parents of 40% of the children born in 2001? From the perspective of the child, it ought to make no difference whether their parents were married when determining the level of support to be offered to the parents – the needs of the children are the same.<sup>152</sup> *Moving Forward Together* goes some way towards acknowledging this.<sup>153</sup>

Barlow and Duncan found that marriage had a social signifying role, buttressed by the myth of the "common law marriage" with nearly all their respondents firmly believing that the law treated cohabitants with children of the relationship in all respects as if they were married.<sup>154</sup> 57% of those interviewed for the 2001/2 British Social Attitudes Survey also falsely believed in the common law marriage myth. They believed that the law gave the same rights to cohabiting couples as married despite common law marriage having been abolished in 1753.<sup>155</sup> There is a need to send out a clear message to dispel this thinking so that cohabitation becomes more of a free and informed choice. After that support should be available equally to the married and the cohabiting.

## 5. Conclusion.

In conclusion, family autonomy ought to be respected provided the family is functioning adequately. However if the public interest is threatened because the family breaks down then state intervention may be justified in particular to protect the needs of children. Taken to its logical conclusion, Governments must also be entitled to intervene to offer support for families to prevent breakdown and thereby avoid the economic costs and the physical and emotional costs associated with family breakdown for both the adults and children involved and to preserve social stability. The uptake of that support must remain voluntary, and the support offered must be timely, accessible and affordable.

If the public interest in need of protection is the needs of children then why should the Government's stance extend to those without minor children? The childless are less likely to be reliant on benefits and will therefore be less of a drain on the public purse. In these circumstances should the more paternalistic aspects of any reformed legislation, for example, compulsory attendance at information meetings be restricted to parents of minor children? There is some justification for this but on balance the misery which divorce visits on those involved is such that support should be available to all, whether married or cohabiting and whether with children or childless.

There is some evidence, as outlined above, that married relationships are more durable than cohabiting ones. Marriage is viewed by most as the ideal family form<sup>156</sup> and remains the choice of the majority. The interests of the adults and children involved and the cost to the public purse on marriage breakdown give strong support to the Government's case for intervention to support

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<sup>151</sup> Day Sclater, S. and Piper, C. *supra* note 38, p.142

<sup>152</sup> Dewar, 'Family Law and its Discontents' *supra* note 6, p.64

<sup>153</sup> *Moving Forward Together* *supra* note 5, p8-9

<sup>154</sup> Barlow and Duncan, *supra* note 146, p.137

<sup>155</sup> *British Social Attitudes Survey 2001/2* *supra* note 73

<sup>156</sup> See Barlow and Duncan, *supra* note 146, p.137 and *British Social Attitudes Survey 2001/2* *supra* note 73

marriage. However this need not be to the detriment of support for cohabitation. The two are not mutually exclusive and both deserve equal merit, particularly where minor children are involved.

### Chapter 3: Can The Law Save “Saveable Marriages”?

“[T]he wisest possible reform we could have on this whole question is to have no legislation whatever. The relations of the sexes are too delicate in their nature for statutes, lawyers, judges, jurors, or our public journals to take cognisance of or regulate.”<sup>1</sup>

As outlined in Chapter 2 there is a degree of ‘ambivalence’ over what we want family law to do.<sup>2</sup> If there is some uncertainty over what we want the law to do, how much more vexing is the question of whether the law can in fact change behaviour. Even if it is accepted that the Government ought to be attempting to save saveable marriage, the extent to which this aim can be achieved through legislative or other means remains a matter of debate.

#### 1. The Difficulties in Assessing the Effectiveness of the Law.

The relationship between law and behaviour is far from clear.<sup>3</sup> It may be that law affects social norms. It may equally be that social norms are affected by the law but “the nature and extent of this relationship is uncertain and problematic.”<sup>4</sup> There is, unfortunately, a paucity of research on the extent to which law can specifically bring about behavioural modification. One reason for this, Gibbs suggests, is the methodological and conceptual problems inherent in determining the efficacy of the law.<sup>5</sup> Just because a person complies with the law one cannot directly infer that his compliance is as a result of the law. Conversely, non-compliance is not necessarily deliberate and wilful refusal to obey the law. A multiplicity of factors including social norms and personal moral preferences will affect to varying degrees the reasons why a particular action is taken or refrained from. Particularly in the realm of intimate relationships, the factors affecting decision making are likely to be so complex, emotion-laden and inter-related that it would be almost impossible to accurately assess the extent to which the law affected the decision making process. Indeed, such is the nature of the decisions, that the parties involved are unlikely to have analysed the precise factors they took into account or be able to isolate individual factors. If the law was taken into account at all it is likely to have been on a subconscious level.

As law is only one of the factors that may influence behaviour, modifications in the law designed to affect behaviour in a given direction may be unsuccessful if the multiplicities of other factors that affect that behaviour are influencing it in the opposite direction.<sup>6</sup>

Divorce law is particularly difficult for modern governments to formulate given the degree of diversity and fluidity in twenty first century family life.<sup>7</sup> Its effect is even more difficult to extrapolate since there is no neat causal relationship between divorce law and actual behaviour. Walker notes, “as historians point out, and as we have found in our evaluation, life is messier than that.”<sup>8</sup>

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<sup>1</sup> Elizabeth Cady Stanton, North American Commentator, (1868) quoted in Rheinstein, M. (1972) *Marriage, Stability, Divorce and the Law*, p.40

<sup>2</sup> Hale, Rt. Hon. Mrs Justice, (1997) ‘The 8<sup>th</sup> ESRC Annual Lecture 1997, Private lives and public duties: what is family law for?’ *J.S.W.F.L.*, vol. 22(2), p. 125

<sup>3</sup> Lewis, J. (2001) ‘Debates and Issues Regarding Marriage and Cohabitation in the British and American Literature’, *I.J.L.P.F.*, vol.15, p.175

<sup>4</sup> Eekelaar, J. (1991) *Regulating Divorce*, p.22

<sup>5</sup> Gibbs, J. (1986) ‘Deterrence Theory and Research’, in G. Melton (ed.) *The Law as a Behavioral Instrument, Nebraska Symposium on Motivation 1985*, Current Theory and Research In Motivation, vol. 33, p.91

<sup>6</sup> Herring, J. (2001) *Family Law*, p.11

<sup>7</sup> Walker, J. (2001) ‘Supporting the Principles of the Family Law,’ in *Final Evaluation Report*, p.807.

<sup>8</sup> Walker, J. (2001) ‘Divorce Reform and The Act’ in *Final Evaluation Report*, p.18

Commentators have very mixed views as to the effect of legal norms on social behaviour. On the one hand Baroness Young has argued forcefully that "law influences behaviour and it sends out a very clear message. There would be no point in legislating at all if law did not influence behaviour"<sup>9</sup> Barlow and Duncan quote Eekelaar and Maclean (1997) who make a similar point arguing that "law is a purposive activity and policymakers expect results."<sup>10</sup> Green takes the view that "law at its best has a tutelary role. It is an affirmation of what is just and right in human affairs, in the hope of bringing out the best in people."<sup>11</sup> Phillips complains that, with respect to the FLA, the Lord Chancellor had been "sucked into the intellectual black hole of his own perception that law is merely the helpless instrument, rather than a significant shaper, of public attitudes."<sup>12</sup> These views as to the extent to which law, of itself, can directly influence behaviour are perhaps optimistic and there are strong academic views to the contrary. Melton notes there is a generally held belief that "*of course* the law affects behavior; it is *The Law...*" but that the actual reality, though not necessarily the perception, is that the law is often ineffective in achieving its desired aims.<sup>13</sup> Citing Zimring and Hawkins he argues that there is often a failure to recognise the distinction between the law's *morality and expediency* as opposed to its *efficacy*.<sup>14</sup>

Dewar suggests that contemporary family law can be characterised as "chaotic, contradictory or incoherent" but that this is a perfectly normal state of affairs given that family law deals with areas of social life and feeling "that are themselves riven with contradictions or paradox."<sup>15</sup> Given that both family law and family breakdown are characterised by chaos, contradictions and incoherence it is perhaps unsurprising that it is difficult to accurately assess the cause and effect between the two. The complexity of the interaction between family law and the various other variables that affect behaviour make purposeful planning difficult even when aims and objectives are clear.<sup>16</sup>

Out of this considerable academic debate, the views of Melton are by far the most persuasive. Although there are strong opposing views most critics would argue that law has little direct influence on family behaviour.<sup>17</sup> The law may legitimise and facilitate certain kinds of behaviour<sup>18</sup> but its role is more symbolic than quantitative. Its symbolic role is discussed in more detail below. Nevertheless even if law cannot reverse the trends in marriage and divorce it can and should create responsive frameworks to support family relationships.<sup>19</sup>

## 2.The Government's Position.

Politicians and policymakers have traditionally assumed that the law not only should but also can affect behaviour otherwise, as Baroness Young asks above, what is the point of legislation?

<sup>9</sup> Hansard HL.col.1638 29.February 1996.

<sup>10</sup> Barlow, A and Duncan, S. (2000) 'Supporting families? New Labour's communitarianism and the 'rationality mistake': Part II', *J.S.W.F.L.* vol. 22(2), p.135-136.

<sup>11</sup> Green, D.G. (1995)'Foreword' in Robert Whelan, (Ed) *Just a Piece of Paper? Divorce Reform and the Undermining of Marriage*, p.iv

<sup>12</sup> Phillips, M (1995) 'Death Blow to Marriage,' in R. Whelan (Ed) *Just a Piece of Paper? Divorce Reform and the Undermining of Marriage*, p.13

<sup>13</sup> Melton, G. (1986) 'The Law and Motivation', in G. Melton (ed.) *The Law as a Behavioral Instrument, Nebraska Symposium on Motivation 1985*, Current Theory and Research In Motivation, vol. 33, p.xv

<sup>14</sup> *Ibid*, p.xvi

<sup>15</sup> Dewar, J. 'The Normal Chaos of Family Law *M.L.R.* Jul 1998 Vol 61, No 4. p.469

<sup>16</sup> Glendon, M.A. (1981) *The New Family and the New Property*, p.137 and Glendon, M.A. (1989) *The Transformation of Family Law, State, Law, and Family in the United States and Western Europe*, p.311

<sup>17</sup> See for example, Andrup, H., Buchhofer, B. and Zieger, K. (1980)'Formal Marriage Under the Crossfire of Social Change,' in John M. Eekelaar and Sanford N Katz (eds.) *Marriage and Cohabitation in Contemporary Societies*, pp.32-38 and Rheinstein, *supra* note 1, p. 137.

<sup>18</sup> Barlow and Duncan Part II *supra* note 10, page 135

<sup>19</sup> See Walker, J. (2000) 'Whither the Family Law Act Part II?' in E. Clarke and Thorpe, The Rt. Hon. Lord Justice (eds.) *No Fault or Flaw The Future of The Act*, pp.3-4 and Walker, J., Timms, N. and Collier, J. (2001) 'The Challenge of Social, Legal and Policy Change' in *Final Evaluation Report*, p.5



However, the 1988 Law Commission accepted that divorce law can do nothing to prevent those who wish to separate from doing so.<sup>20</sup> Its follow up report in 1990 is sceptical about the extent to which law can buttress and promote marriage.<sup>21</sup> Eekelaar describes the Law Commission's approach as "regularization", a fatalistic acceptance that divorce will occur whatever legislation is enacted but he expresses the view that the FLA contains a far greater element of "regulation." He argues that rather than trying to affect behaviour through moral precepts as the fault-based system does, the system under the FLA would have attempted to influence it by procedures.<sup>22</sup> Those procedures would have included compulsory attendance at an information meeting for the initiator of a divorce, encouragement to attend a meeting with a marriage counsellor and mediation, the requirement that all financial matters be resolved before the divorce is finalised and the compulsory waiting period for "consideration and reflection."<sup>23</sup> The potential effectiveness of these proposed measures will be examined below.

The explicit principle of marriage-saving set out in the FLA<sup>24</sup> marked a retreat from the view that law should facilitate and implement private decisions towards an attempt to actually influence those decisions themselves.<sup>25</sup> Even before it was enacted however, the limitations of the law in affecting behaviour were noted. The then Lord Chancellor, Lord Mackay of Clashfern, stated in his foreword to the Government's Green Paper, "seeking to prevent the breakdown of marriages is an objective which goes far beyond the scope of the law."<sup>26</sup> The Government recognised that its marriage saving attempts and in particular the promotion of counselling was unlikely to turn many back from the brink of divorce. A figure of 5% was suggested in the debates surrounding the passage of the FLA,<sup>27</sup> which the Final Evaluation Report concludes "would seem to be a realistic target."<sup>28</sup>

In *Supporting Families* there is a recognition that family policy has "suffered from the misguided view that there are large levers that governments can pull to affect how families behave" when "the truth is that families are, and will always be, mainly shaped by private choices well beyond the influence of government." The consultation paper confirms that this is how it should be but concludes that "this is no excuse for government not to do what it can."<sup>29</sup> *Moving Forward Together* similarly concludes, "we have no illusions about what can be done, but we recognise that even modest improvements are worthwhile, not least in raising the importance of supporting couples - of investing in the couple."<sup>30</sup>

The recognition that law can do little to turn back those on the brink of divorce is realistic. "Investing in the couple", maintaining and enhancing marital stability, must be the most effective way of reducing divorce and the Government needs to grasp the fundamental importance of this.

### 3. Modern Barriers to achieving Behaviour Change.

If the Government, as it appears to, recognises the limited success that changing legislation is likely to have on changing behaviour, what are the factors which may assist or impede behavioural change in the desired direction? An understanding of these factors is likely to be crucial to the success or otherwise of future legislation.

<sup>20</sup> Law Commission (1988) *Facing the Future: A Discussion Paper on the Ground for Divorce*, Law Com. No. 170, para 3.6

<sup>21</sup> Law Commission (1990) *The Ground for Divorce*, Law Com. No. 192, para. 3.6.

<sup>22</sup> Eekelaar, *Regulating Divorce*, supra note 4, pp.142/3

<sup>23</sup> See generally Chapter 1, p.5-6

<sup>24</sup> Family Law Act 1996, ss.1 (b)

<sup>25</sup> Dewar, supra note 15, p.477

<sup>26</sup> Mackay, (1993) Foreword to *Looking to the Future: Mediation and the Ground for Divorce*, Cm 2424, p.iii

<sup>27</sup> Mr Paul Boateng MP (Brent South), Official Report (H.C. Standing Committee E), 7 May 1996 at col. 128)

<sup>28</sup> Walker, J. (2000) *Final Evaluation Report Summary*, p.32

<sup>29</sup> *Supporting Families: A Consultation Document*. Home Office 1998, Introduction, p.16

<sup>30</sup> Lord Chancellor's Department (2002) *Moving Forward Together: A Proposed Strategy for Marriage and Relationship Support for 2002 and Beyond*, Advisory Group on Marriage and Relationship Support para. 10.3

### 3.1 Timing.

One factor which will determine the success of any marriage saving initiative is its timing. Clulow argues that "there is something imaginatively self-contradicting in a system that offers marriage counselling to those seeking divorce" and that whilst this may accommodate the "ambivalence and contradictory feelings" surrounding the ending of marriage for some "most people would accept that the threshold of divorce is likely to be late in the day for mobilising the resources needed to save a marriage."<sup>31</sup> This view may appear obvious but it is effectively what the FLA was attempting to do. Most commentators share Clulow's view.<sup>32</sup> *Moving Forward Together* also recognises that the current emphasis on "tertiary" i.e. crisis intervention rather than "primary" intervention is generally "too little, too late."<sup>33</sup> Traditionally it was assumed that parties tended to resort to divorce at the first sign of difficulties without making any real effort to save the marriage.<sup>34</sup> However, several studies have found that this analysis is misleading and that many couples have gone to great lengths and often suffered years of misery before resorting to divorce. It is not, contrary to popular belief, a decision taken lightly<sup>35</sup> and consequently intervention at a late stage is unlikely to be effective.

A further exacerbating factor is that the separation process often occurs "asymmetrically" for the parties. Vaughan, following a study of 103 respondents in America, found that invariably one party begins to get dissatisfied with a relationship long before the other. That party will often go some way in becoming emotionally separated from their partner before they reveal to them the extent of their dissatisfaction. The partner, who may initially have rationalised the problems as normal or temporary or denied they exist, realising that the relationship is in serious trouble, will enter a period of trying to save it, but their efforts are often temporary and usually unsuccessful, being viewed by the initiator as coming too late.<sup>36</sup> As one respondent put it, "*I was mentally divorced before I left, I think is a fair way of putting it. I went through a lot of trauma early on-it wasn't that I avoided that experience while she got it full blast; it was that I had that experience at a different time*" (Psychologist, aged 44, divorced after 12 years.)<sup>37</sup> Hart, who found that the status passage from feeling married to feeling divorced can be extraneous to the legal divorce process, also noted this.<sup>38</sup>

Vaughan's findings with regard to the asymmetry of the uncoupling process, emphasises the great difficulty in successfully intervening in a marriage to save it at a late stage in that process and therefore the utter futility of concentrating resources on 'tertiary intervention' in marital therapy. This latter point is at least now recognised in the LCD's Report, *Moving Forward Together*. Vaughan recognises the fundamental importance of fostering an environment in which people are able to reveal and seek assistance for their marital difficulties at an early stage. She states "With early revelation of secrets, the asymmetry that characterizes most leave-takings is missing, creating the possibility that two people may try-and succeed."<sup>39</sup> How these insights can successfully impact upon future legislation will be considered further in Chapter 4 below.

<sup>31</sup> Clulow, Dr C. (2000) 'Supporting Marriage in the Theatre of Divorce', in Thorpe, The Rt. Hon. Lord Justice and E. Clarke (eds.) *No Fault or Flaw The Future of The Act*, p.23

<sup>32</sup> See for example Mansfield, P. (2000) 'From Divorce Prevention to Marriage Support', in Thorpe, The Rt. Hon. Lord Justice and E. Clarke (eds.) *No Fault or Flaw The Future of The Act*, p.31, Walker, Final Evaluation Report Summary, supra note 28, p.37, Walker, J. (1991) 'Divorce – Whose Fault? Is the Law Commission Getting It Right?' *F.L.*, p.235

<sup>33</sup> *Moving Forward Together* supra note 30 at para 5.

<sup>34</sup> *The (Morton) Royal Commission on Marriage and Divorce*, 1956, Cmnd. 9678, para. 50. ff

<sup>35</sup> See for example Davis, G. and Murch, M. (1988) *Grounds for Divorce*, p.36, Clulow supra note 31, p.23, Walker, *Final Evaluation Report Summary*, supra note 28, p.31, Walker 'Supporting the Principles of the Family Law Act,' *Final Evaluation Report*, supra note 7, p.812

<sup>36</sup> Vaughan, D. (1986) *Uncoupling, Turning Points in Intimate Relationships*, p.110. Hart, N., (1976) *When Marriage Ends: A Study in Status Passage* also observes the phenomenon of one party viewing the marriage at crisis point whilst the other sees any difficulties as normal and the relationship as not seriously threatened, p.111

<sup>37</sup> Vaughan supra note 36, p.137

<sup>38</sup> Hart supra note 36, p.106

<sup>39</sup> *ibid.* p.195

Davis and Murch argue that since divorce proceedings tend to be instituted whilst the parties are still living together, or following only a very brief period of separation, "the possibility of reconciliation may exist in a great many cases."<sup>40</sup> They then quote the falloff rate between 1980 and 1983 as 2% between decree nisi and decree absolute and 12-15% between petition and decree nisi, concluding that, whilst petitions being abandoned and issued on alternative grounds would account for some of the reduction some are likely to have been as a result of reconciliation.<sup>41</sup> Of the initially defended divorces in the Bristol Court studied by Davis and Murch there was clear evidence of reconciliation attempts in 9% with a further 18/114 where no decree nisi had been pronounced on average two years and six months after the petition had been filed although it wasn't clear how many of these, if any, were because of reconciliation.<sup>42</sup>

In Davis and Murch's Special Procedure Survey 39% of Respondents and 23% of Petitioners claimed they would have preferred to stay married. In their Conciliation in Divorce study 40% made that claim although it needs to be acknowledged that some of those interviewed may have interpreted the question hypothetically – rather than as pertaining to the actual circumstances of their marriage. In their Special Procedure Survey 15% denied that their marriage had broken down and a further 10% were undecided.<sup>43</sup> Whilst this does not mean that those people will or may reconcile or that any reconciliation is as a result of the law's influence, Davis and Murch conclude that the assumption of *A Better Way Out* that, by the time either spouse reaches the stage of consulting a solicitor about divorce proceedings, the breakdown of the marriage has reached the point of no return and it is too late for there to be any real prospect of reconciliation<sup>44</sup> is "beyond doubt"… "seriously wide of the mark."<sup>45</sup> Their findings highlight the fact that undoubtedly there remains the possibility of reconciliation at this late stage. However the prospects must be far greater if attempts are made to save the marriage when problems first appear.

### 3.2 From Institutional to Companionate Marriage.

Perhaps one of the most fundamental changes in modern family life which legislators will have to contend with when considering what effect, if any, proposed legislative changes will have on behaviour is the move from 'institutional' to so-called "companionate" marriage, or the "pure relationship" as Giddens terms it.<sup>46</sup> The modern emphasis within marriage has been said to be the pursuit of happiness and individual fulfilment.<sup>47</sup> James and Richards caution that an emphasis on the fulfilment of the parties can lead to the needs of children being marginalised.<sup>48</sup> The companionate marriage contains elements of contradiction in that, whilst it lasts, it is more intense than traditional marriage but since the expectations are also higher in terms of emotional support, greater companionship, a sharing of tastes and interests, intellectual stimulation and sexual gratification, it is more perishable and unstable.<sup>49</sup> As Rheinstein puts it, "in all these more subtle aspects of marriage we need more, we expect more, and we are more easily disappointed."<sup>50</sup> Whilst more is expected of personal relationships, social conditions have rendered them increasingly more fragile.<sup>51</sup> The high premium placed on the relational elements of marriage has increased the pressure to

<sup>40</sup> Davis and Murch supra note 35, p.53

<sup>41</sup> *ibid.*

<sup>42</sup> *ibid.* p.62

<sup>43</sup> *ibid.* p.54

<sup>44</sup> Law Society, *A Better Way Out* (1979), para 178

<sup>45</sup> Davis and Murch supra note 35, p.56

<sup>46</sup> For definition see Giddens supra Chapter 2, note 42

<sup>47</sup> Eekelaar, *Regulating Divorce*, supra note 4, p.16

<sup>48</sup> James, A. and Richards, M. (1999) 'Sociological perspectives, family policy, family law and children: Adult thinking and sociological tinkering', *J.S.W.F.L.*, vol. 21(1), pp.35-36.

<sup>49</sup> Glendon, *The New Family and the New Property*, supra note 16, p.64

<sup>50</sup> Rheinstein supra note 1, p.274

<sup>51</sup> Glendon, M.A., (1989) *The Transformation of Family Law*, supra note 16, p.86

leave the marriage if it fails to live up to expectations, and there is less of a stigma attached to doing so.<sup>52</sup>

It may be that divorce has increased not because people no longer believe in marriage but because their expectations are that much higher and they are not prepared to settle for "second best." On this view divorce may be seen as "a back-handed compliment to the ideal of modern marriage, as well as a testimony to its difficulties."<sup>53</sup>

Giddens sees modern relationships as characterised by "confluent love" which he describes as an "active, contingent love" lacking a "for-ever and one-and-only factor" where the emphasis is on the "special relationship" rather than "the special person." Giddens views the "separating and divorcing society" of today as "an effect of the emergence of confluent love rather than its cause."<sup>54</sup> The emergence of confluent love within our society has arguably disposed people to feel more justified in abandoning relationships if they no longer fulfil expectations. Gibson links these developments to the consumerism and individualism that characterises modern society where the "ethos of self-fulfilment, every day provides a fresh spousal opportunity to re-examine the barometers of marital felicity."<sup>55</sup> These developments have also helped break down the stigma attached to divorce with the greater numbers who have divorced attesting that it is survivable<sup>56</sup>.

The increased expectations of what marriage should provide has been seen to be particularly marked in women. It is perhaps not surprising in those circumstances that of the divorces granted in 2000 42,311 were on the husband's petition whereas 98,227 were on the petition of the wife. On the "fault" grounds a little over 75% of the 96,492 divorces granted were to the wife.<sup>57</sup> However it is difficult to assess how far this is a reflection of greater marital dissatisfaction levels amongst women and how far it is simply because more women are entitled to assistance under the Legal Help scheme or that women wish to be more in control of the speed of the proceedings because sorting out the financial aspects may be more pressing to them than their spouse.

Reynolds and Mansfield quote Chafetz (1992) as stating "the average, once acceptable marriage increasingly becomes re-conceptualised by many women as short on intimacy and equality and therefore as unacceptable. The feminist message functions to raise the ideal standards or expectations against which marriages are increasingly measured, and therefore raises the frequency with which they will be found to be wanting."<sup>58</sup> Reynolds and Mansfield do not find changes in marital expectations on the part of women incompatible with happy marriages but it does require men to adapt to new gender roles and negotiation by the couple to ensure that the relationship meets changed expectations.<sup>59</sup>

Any policy developments in the family law arena must take into account the changes outlined above in terms of the rise of the companionate marriage, individualism and expectations within marriage otherwise they risk being irrelevant or even counter-productive.

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<sup>52</sup> Reynolds, J. and Mansfield, P. (1999) 'The Effect of Changing Attitudes to Marriage on its Stability', in *High Divorce Rates: The State of the Evidence on Reasons and Remedies* (Lord Chancellor's Department), vol.1 Paper 3, p.(v)

<sup>53</sup> Davis and Murch supra note 35,p.31

<sup>54</sup> Giddens, A. (1992) *The Transformation of Intimacy*, pp.61/2

<sup>55</sup> Gibson, C.S., (1994) *Dissolving Wedlock*. p.214. Glendon also writes of the penetration into the realm of the family of "marketplace values." Glendon *The New Family and the New Property* supra note 16,p.199. See also Reynolds and Mansfield supra note 52,p.8

<sup>56</sup> Gibson supra note 55,p.216

<sup>57</sup> Office of National Statistics, *Marriage, divorce and adoption statistics, 2000*, Series FM2 no.28 Table 4.21

<sup>58</sup> Reynolds and Mansfield supra note 52,p.5

<sup>59</sup> *ibid.* p.30

### 3.3 Changes in the Nature of Commitment.

Allied to the changes outlined in 3.2 above, is the potential effect on behaviour of changes in the nature of commitment between parties in recent decades. Lewis notes that the nature of commitment has changed over the last generation with the younger generation, married or cohabiting, much more likely to qualify or reject the idea of obligation, viewing commitment as voluntary whereas the older generation expressed a sense of obligation and a commitment to their marriage vows.<sup>60</sup> Lewis concludes that married couples tended to make a more public commitment whilst cohabiting couples were private in their commitment, although all the couples in her study expressed a clear parental commitment.<sup>61</sup> The more voluntary, private nature of commitment shown by the present generation in comparison to their parent's generation may make it more difficult for policies to be devised to moderate behaviour. Walker quoting Clulow states, "privatised marriage is the hardest kind to help since couples are reluctant to disclose their problems and others are reluctant to intrude."<sup>62</sup>

Lewis concludes that modern couples do wish to express commitment but they also wish to pursue self-interest.<sup>63</sup> Askham has previously cautioned that such pursuit of self interest is likely to lead to increased marital breakdown. Askham identifies two key components of marriage that must be successfully balanced if marital stability is to be maintained. They are stability-maintaining and identity-upholding behaviour.<sup>64</sup> Stability-maintaining activities include for example, time shared together. Identity-upholding behaviour is that which upholds an individual's sense of identity, e.g. the pursuit of one's own hobby. In Askham's view the over-emphasis of the pursuit of self interest and identity will render relationships vulnerable "since stability-maintaining behaviour will not be able to operate effectively."<sup>65</sup> Askham concludes that compromise will therefore not only be difficult to achieve but the parties are unlikely to even desire it.<sup>66</sup> In those circumstances given the contingent nature of modern commitment as identified by Giddens<sup>67</sup> there may be a greater tendency to choose to leave the relationship if it fails to live up to expectations. Given these developments any attempt by governments to try to utilise the law to restore traditional notions of marriage is likely to be met with fierce resistance and a refusal to compromise expectations. Only if the Government is willing and able to introduce innovative, tailored measures to help restore satisfaction levels is its marriage saving agenda likely to have any degree of success.

### 3.4 The Emancipation of Women.

Another major societal change which may have had an effect on the stability of marriage and which will influence whether marriages can be saved through legislative means is the emancipation of women, that is the large increases in recent decades of women participating in the workforce and the greater economic and social freedoms this has brought them. This emancipation may be responsible in part for the increased expectations of women regarding what marriage should provide with a consequent change in their marital behaviour. Women's increased earning power is said to have disrupted the traditional balance between breadwinner and homemaker thereby threatening the stability of marriage since it no longer offers unequivocal benefits to women.<sup>68</sup> (Although feminists would no doubt raise issue with the notion that the traditional, patriarchal marriage did in fact provide such unequivocal benefits.)

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<sup>60</sup> Lewis, J. (1999) "Marriage and cohabitation and the nature of commitment" *C.F.L.Q.*, Vol 11, No 4, p.359

<sup>61</sup> *ibid.* p.363

<sup>62</sup> Walker, Timms and Collier, *supra* note 19, p.8

<sup>63</sup> Lewis, *Marriage and Cohabitation Debates*, *supra* note 3, p.180

<sup>64</sup> Askham, J. (1984) *Identity and Stability in Marriage*, p.183

<sup>65</sup> *ibid.* p.194

<sup>66</sup> *ibid.* pp.194-5

<sup>67</sup> see *supra* note 54

<sup>68</sup> *ibid.* pp.163-4

Gibson points to improvements in education, employment, health care, fertility, welfare payments and more favourable treatment under the law, together with a loosening of moral sanctions, all of which have worked to give women more choice to leave unsatisfactory marriages.<sup>69</sup> Davis and Murch point out that "all this only matters to the extent that women *want* to abandon their marriages." They note that there is often a gulf between how husbands and wives view their marriage, with his marriage invariably being more satisfactory than hers. They conclude that female emancipation appears to have affected divorce rates in two ways, firstly by raising women's expectations as to what marriage should provide and secondly by giving them the ability financially to leave if they so choose.<sup>70</sup>

Glendon suggests that the reduced economic importance of marriage resulting from women's greater economic freedom has rendered marriage unstable.<sup>71</sup> Similarly, McAllister notes that the economic incentives to marry or to stay married diminish as both women's earning capacity and men's unemployment levels increase.<sup>72</sup> There does seem to be some statistical support for these hypotheses. For example, studies in America have shown that a \$5000 increase in women's income after marriage increased the odds of divorce or separation by about 5%.<sup>73</sup> In addition, women who work most during marriage have been found to be most likely to divorce.<sup>74</sup> However, McAllister cautions against assuming a direct correlation between women's participation in the workplace and divorce since women continue to be at least partially dependant financially on their husbands, especially after they have children, and research shows a persistent propensity for educated women to marry which does "not fit a simplistic model of economic determinism."<sup>75</sup> Whilst economic factors have a role to play McAllister's analysis of the available research leads her to conclude that demographic factors have a greater impact on the risk of marital breakdown.<sup>76</sup> This accords with the research of Clarke and Berrington.<sup>77</sup>

### 3.5 Socio-demographic factors.

An understanding of the socio-demographic predictors of divorce is likely to be crucial to the Government when formulating future legislation aimed at supporting marriage. Clarke and Berrington usefully analyse these factors, the most important of which include, parents socio-economic status, parental separation, early age at marriage, premarital cohabitation, previous experience of partnership or marital dissolution, premarital or early marriage conception and, to a lesser extent, social class.<sup>78</sup> Targeting support towards those in these known risk categories may help stabilise these marriages. Clarke and Berrington caution, however, that these demographic factors may be linked to other factors such as the person's emotional and psychological characteristics or perhaps even a biological predisposition to handle stress in a certain manner and a direct causal link should not therefore always be assumed.<sup>79</sup>

The likelihood of successfully utilising the law to modify behaviour will inevitably be affected by the profound societal changes witnessed in recent decades. Glendon refers to these

<sup>69</sup> Gibson, supra note 55, p.215

<sup>70</sup> Davis and Murch supra note 35, p.31

<sup>71</sup> Glendon, M.A., (1989) *The Transformation of Family Law*, supra note 16, p.195

<sup>72</sup> McAllister, F. (1999) 'Effects of Changing Material Circumstances on the Incidence of Marital Breakdown', in *High Divorce Rates: The State of the Evidence on Reasons and Remedies* (Lord Chancellor's Department), vol.1 Paper 2, p.(v)

<sup>73</sup> *ibid.*, p.25

<sup>74</sup> *ibid.*

<sup>75</sup> *ibid.*, p.26

<sup>76</sup> *ibid.*, p.(v)

<sup>77</sup> Clarke, L. and Berrington, A. (1999) 'Socio-demographic Predictors of Divorce' in *High Divorce Rates: The State of the Evidence on Reasons and Remedies* (Lord Chancellor's Department), vol.1 Paper 1, p.26

<sup>78</sup> *ibid.*, pp.13-21

<sup>79</sup> *ibid.*, p.27

changes as "the new family."<sup>80</sup> Day Sclater and Piper list these as including rising divorce rates, falling marriage rates, increasing cohabitation, increases in the number of children born outside marriage, a separation of sex and marriage, and of marriage and parenthood and point out that these changes in family patterns are part and parcel of broader social, political and economic trends. They convincingly conclude that "a family law that seeks to address, or even reverse, changes in 'the family', simply by means of legislation is attempting an impossible task."<sup>81</sup>

### 3.6 Other Societal Changes.

Other societal changes that may affect the divorce rate include the lessening of the social stigma attached to divorce which may have led to a degree of social imitation,<sup>82</sup> increased urbanisation leading to uprooting and greater social isolation,<sup>83</sup> and increased secularisation with the result that people do not feel the same moral compunction to stay in a relationship they consider to be unsatisfactory.<sup>84</sup>

Whilst the possibility of changing behaviour *per se* is not an impossible task, the fundamental changes in society, in particular in terms of what marriage is now expected to provide, outlined above will make achieving such change that much more difficult. Day Sclater and Piper's estimation that achieving such change *through legislative changes alone*<sup>85</sup> is unlikely to meet with much success is likely to be accurate. The trend towards expecting more from marriage is unlikely to change. However this does not mean, for the majority, a rejection of marriage, simply a rejection of unsatisfactory marriage. What is needed, if divorce rates are to be positively affected, is the early identification of marital stress coupled with targeted, accessible advice and support with the aim of improving or restoring marital satisfaction levels. This will require inter-departmental cooperation and co-ordination on a governmental level. Family supportive policies need to be a fundamental concern when considering a raft of social issues including employment, housing, welfare benefits etc. To confine efforts specifically to family law legislation, and divorce legislation at that, is not sufficient. The Government appears at last to be recognising this through such documents as *Supporting Families* and its endorsement of the recommendations in *Moving Forward Together*. How best to frame further legislation and state effort to support the family will be considered in Chapter 4.

## 4. The Effect of Law on Behaviour.

Having regard to the fact that the societal changes outlined above will make achieving behavioural change through the law that much more difficult, consideration will now be given to how, and through what mechanisms, the law in general can in fact control and modify behaviour, and more particularly marital behaviour.

### 4.1 Deterrence and coercion.

Deterrence is more often associated with criminal rather than family law. Gibbs defines deterrence as occurring "when a potential offender refrains from or curtails criminal activity because he or she perceives some threat of a legal punishment for contrary behavior and

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<sup>80</sup> Glendon, *The New Family and the New Property* supra note 16, p.1

<sup>81</sup> Day Sclater, S. and Piper C. (1999) 'The Act in Context', in S. Day Sclater and C. Piper (eds.) *Undercurrents of Divorce*, pp.7-8.

<sup>82</sup> Gorecki, J. (1980) 'Moral Premises of Contemporary Divorce Laws: Western and Eastern Europe and the United States' in *Marriage and Cohabitation in Contemporary Societies*. John M. Eekelaar and Sanford N Katz (eds), p. 130

<sup>83</sup> Davis and Murch supra note 35, p.30, see also Rheinstein supra note 1, p.306-307

<sup>84</sup> Rheinstein supra note 1, p.284

<sup>85</sup> See note 81 above.

fears that punishment."<sup>86</sup> He concludes that the majority of findings indicate that offenders are not deterred when punished.<sup>87</sup> If the effectiveness of deterrence in the criminal field is limited it is likely to be even less effective or appropriate within family law. Similarly since family law attempts to regulate the most intimate relationships coercion is unlikely to be effective.<sup>88</sup> A more restrictive divorce law will not prevent marital breakdown, it will simply prevent those who separate from formalising matters by way of a divorce, thereby preventing remarriages. One of the aims of the Divorce Reform Act 1969 was to prevent such an eventuality and to return to a more restrictive divorce law would be a retrograde step and one which is likely to meet with fierce public opposition. Whilst some more conservative commentators have argued for a more restrictive law<sup>89</sup> most would accept that it would be inappropriate.<sup>90</sup> Others, whilst not wishing to see a return to a more draconian law would resist the abandonment of fault fearing the effect that this would have on morals, on marriage stability and on general perceptions of justice.<sup>91</sup> Whilst the divorce rate appears currently to have plateaued the huge increase in the divorce rate since the Divorce Reform Act 1969 and subsequent Matrimonial Causes Act 1973 were implemented is testament to the failure of fault clauses to stem divorce. The law cannot make parties live together harmoniously.<sup>92</sup> Rheinstein studied the divorce laws in the contrasting societies of England, France, Italy, Japan, the Soviet Union, Sweden, West Germany and the United States and concluded that, "restrictions on divorce are found to exert but a minor influence on the incidence of divorce."<sup>93</sup> Whilst figures for those who separate only are difficult to establish, Glendon points to the avoidance techniques adopted by the separated in Ireland, where divorce is forbidden, for example requests for church annulments and recourse to divorce in other jurisdictions, usually England, as evidence that even the non-availability of divorce does not guarantee marital stability.<sup>94</sup>

In order to ascertain how far the law can influence attitudes and behaviour Farrington and Hawkins reviewed the studies by Walker and Argyle (1964) and of Berkowitz and Walker (1967) in which half the sample were told that certain acts were illegal and certain weren't and the other half were told the reverse and concluded that "these studies indicate that moral judgments about an act are not greatly affected by whether or not it is prohibited by the law, and that the law is a much less important influence of moral judgments than what other people think."<sup>95</sup> These findings regarding the effect of law generally echo the findings of Barlow and Duncan<sup>96</sup> and Hibbs, Barton and Beswick<sup>97</sup> investigating the reasons why people choose to cohabit or marry, namely that the moral decisions people take often bear little or false account of their legal position in relation to that decision.

It would appear from the above that marriage is too intimate for the law to be effectively applied using deterrence or coercive tactics. Rheinstein queries whether a strict divorce law might have a stabilising effect on marriage<sup>98</sup> but ultimately concludes, rightly so, that it would not have a significant effect on the rate of breakdown. If the Government is committed to

<sup>86</sup> Gibbs, supra note 5, p.87

<sup>87</sup> ibid. p.122

<sup>88</sup> Bainham, A. (1998) Changing families and changing concepts-reforming the language of family law. *C.F.L.Q.R.* Vol 10 number 1 p.2

<sup>89</sup> Barry, N. (1995) 'Justice and Liberty in Marriage and Divorce' in R. Whelan (Ed) *Just a Piece of Paper? Divorce Reform and the Undermining of Marriage*, 1995.

<sup>90</sup> Hale, supra note 2, p.133

<sup>91</sup> see for example Christensen, B. (1995) 'Taking Stock: Assessing Twenty Years of 'No Fault' Divorce' in R. Whelan (Ed) *Just a Piece of Paper? Divorce Reform and the Undermining of Marriage*. 1995, Phillips, supra note 12, p.14, Gorecki, supra note 82, p.127-128

<sup>92</sup> Walker, 'Divorce - Whose Fault?' supra note 32, p.234 and Bainham, supra note 88, p.2

<sup>93</sup> Rheinstein, supra note 1, p.291

<sup>94</sup> Glendon, *The New Family and the New Property*, supra note 16, p.125

<sup>95</sup> Farrington, D.P. and Hawkins, K. (1979) 'Psychological Research on Behaviour in Legal Contexts' in *Psychology, Law and Legal Processes* Farrington, Hawkins and Lloyd-Boswick (eds.), p.9

<sup>96</sup> Barlow and Duncan Part II supra note 10, p.136

<sup>97</sup> Hibbs, M., Barton, C. and Beswick, J. (2001) Why marry? -Perceptions of the Affianced *F.L.* p. 207.

<sup>98</sup> Rheinstein, supra note 1, p.283



reducing breakdown rates, sensitive, supportive measures to enhance marital quality are needed.

#### 4.2 Incentives

If deterrence and coercion are unsuited to the family arena then would, one might ask, an incentive based approach be any more successful? Gibbs notes that "although the scientific literature is limited, some reports suggest that incentive schemes may be comparatively more efficacious than (other)...legal interventions as devices for achieving paternalistic policies."<sup>99</sup> Incentives used to be offered in the form of more favourable taxing systems for the married. And whilst these are no longer available, there is little evidence in any event that fiscal measures had any effect on marital behaviour.<sup>100</sup>

Measuring the effectiveness of incentives will be hampered by the difficulty of isolating incentives from other influences on behaviour. Marriage arguably offers incentives in the more favourable treatment of spouses in terms of property rights, maintenance and pensions on divorce and pensions and inheritance rights on death, compared to the "rights" of cohabitants but these may have little influence since many couples appear to drift into cohabitation without really considering the legal implications.<sup>101</sup> Of greater concern is the widespread ignorance of the legal effect of marriage as opposed to cohabitation, which has been noted by a number of commentators<sup>102</sup> and the pervasiveness of the "common law marriage myth." The legal advantages of marriage are going to have little effect if they are not disseminated and if the Government really wishes to push forward a pro-marriage agenda then it may wish to consider a public education campaign aimed at dispelling the ignorance concerning the "common law marriage myth." *Supporting Families* does suggest that a "simple and clear guide" to the rights and responsibilities of marriage be made available through churches and other establishments which carry out weddings<sup>103</sup> and that a similar guide for cohabitation be made available at libraries and C.A.B's.<sup>104</sup> The problem with this is that the marriage information only targets those who have already made the decision to marry and the limited distribution of the cohabitation information may mean that it will not fully reach its intended audience. Perhaps a more proactive radio/television campaign could be considered, although this would have to be presented in a balanced, neutral way if accusations of "nannying" are to be avoided.

Parkman argues that no fault divorce reduces the incentive to parties to invest in their marriage since it reduces the legal protection of spouses who do not want a divorce.<sup>105</sup> Given the relative ease with which a divorce can be obtained on the current fault and no-fault basis and given that fault, unless gross, has long since ceased being relevant to the issue of financial relief, this position is difficult to sustain. There is evidence that the legal and economic consequences of marriage figure little in decisions to marry.<sup>106</sup> Anticipation of poverty is also believed not to deter divorce.<sup>107</sup> In these circumstances it is difficult to foresee that a change in the law to remove fault will have any great effect on people's investment in their marriage. Far more complex factors affect such emotive decision-making.

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<sup>99</sup> Gibbs, supra note 5 p.188

<sup>100</sup> Eekelaar, J. (2000) 'Uncovering Social Obligations: Family Law and the Responsible Citizen' in *Making Law for Families*, Ed., Mavis Maclean, p.23

<sup>101</sup> Lewis, 'Marriage, cohabitation and commitment' supra note 60,p.363.

<sup>102</sup> See Barlow and Duncan Part II supra note 10 p.136 and Hibbs, Barton and Beswick supra note 97,p.207. For public ignorance of the law generally see Farrington and Hawkins supra note 95,p.5

<sup>103</sup> *Supporting Families*, supra note 29, para.4.13 and 4.14

<sup>104</sup> *ibid.* para. 4.15

<sup>105</sup> Parkman, A.M., (1995) 'The Deterioration of the Family: A Law and Economic Perspective', in Melton, G.B.(ed.) *The Individual, the Family, and Social Good: Personal Fulfilment in Times of Change*. Vol 42 of the Nebraska Symposium on Motivation, p.37

<sup>106</sup> Hibbs, Barton and Beswick supra note 97,p.201

<sup>107</sup> McAllister, supra note 72,p.36

### 4.3 Deference.

It is possible that the general deference that law commands may be harnessed by the Government to achieve the behavioural changes it desires. Fletcher states that respect for the law must be expressed as respect for the aspects of the law that is "purely abstract," the aspect of the law which Kant termed the "ruledness" or "law-likeness" (*Gesetzlichkeit*).<sup>108</sup>

Bonnie suggests that governments can express and formalise social norms through legal intervention and that, to the extent that citizens generally defer to the law, government interventions can serve an "educative" or "didactic" role. He further suggests that if certain behaviour is generally disapproved of the law can serve to reinforce this view. The respect and deference the law attracts may also enable governments to intervene to affect public attitudes, provided those attitudes are not "deeply rooted or in transition" Bonnie believes that law is "an integrated strand of the socializing process" which can, over time, affect attitudes and, indirectly, conduct.<sup>109</sup> Glendon cautions however that belief in legality is waning and that "the power of law alone, unsupported by other norms, seems extremely limited....The fact that "it's the law" is simply not enough in itself to command widespread orientation of behaviour."<sup>110</sup> Whilst it is notoriously difficult to measure the effectiveness of law's didactic role because of the influence of a myriad of other factors on the decision making process, difficulties in quantifying effect should not detract from the important socialising role of law and its potential for achieving behaviour change, with the important caveat that the behaviour sought to be changed must not be too deeply established. Given the profound societal changes of recent decades, as outlined above, it may be that such areas as increased expectations in marriage are now so firmly established that attempts to modify behaviour without, for example, supporting and enhancing marital felicity will be futile.

Tyler and Degoey argue that authority must be viewed as legitimate to be deferred to by the populace.<sup>111</sup> Legitimacy may be gained using an instrumental approach, that is, through rewards and punishments, but these are of limited effect in family settings. Tyler and Degoey therefore suggest that social good and the legitimacy of authority may be enhanced by identification with a social group and the perceived fairness in which group authorities make decisions.<sup>112</sup> They found that in both community and family settings it was these two factors rather than the favourability of the authority's decision that affected willingness to defer to authority. Using social-identity theory and self-categorisation theory Tyler and Degoey propose that people who identify with groups develop psychological attachments to them and internalise the group's values and goals into their self-concepts. These attachments alter the basis of their attitudes and behaviours.<sup>113</sup> This finding could have interesting implications. If identification with a group does enhance the legitimacy accorded to an authority then the weakening of community ties, social networks and the role of the extended family has worrying implications. The internalisation of group values will only be of benefit to the government's marriage saving agenda if the values internalised are ones of greater commitment to individual marriages. If the value internalised is the pursuit of individualism then this may have a negative effect on marital stability. Tyler and Degoey did find, when comparing a community setting to a family setting that people had less to lose by self-interested behaviour within the family context. Studies have shown that the majority of people still view the institution of marriage with respect and regard it as the most favourable

<sup>108</sup> Fletcher, G.P. (1996) *Basic Concepts of Legal Thought* p.147

<sup>109</sup> Bonnie, R. (1986) 'The Efficacy of Law as a Paternalistic Instrument', in G. Melton (ed.) *The Law as a Behavioral Instrument, Nebraska Symposium on Motivation 1985*, vol. 33, p.183

<sup>110</sup> Glendon *supra* note 16, p.120

<sup>111</sup> Tyler, T.R. and Degoey, P. (1995) 'Community, Family, and Social Good: The Psychological Dynamics of Procedural Justice and Social Identification' in Melton, G.B.(ed) *The Individual, the Family, and Social Good: Personal Fulfilment in Times of Change*. Vol 42 of the Nebraska Symposium on Motivation, p.56-7

<sup>112</sup> *ibid.* p.59

<sup>113</sup> *ibid.* p.60

family form.<sup>114</sup> It is commitment to their own marriage when that marriage is perceived to no longer live up to expectations that is the difficulty. The Government needs somehow to harness this commitment to the institution of marriage and take steps to reinforce and strengthen it. Crucially however it must also foster a climate in which the group value being internalised is a striving to continually improve one's own marriage/relationship and the seeking of early assistance in times of difficulty, if it is, in time, to begin to reverse the trends in relationship breakdown. To be successful these measures must be backed by the provision of accessible, affordable support.

#### 4.4 Law's Symbolic Effect.

If law can affect behaviour in the family arena then it is most likely to be through its symbolic effect. As Bainham puts it, "family law is inherently unenforceable in the traditional sense since it attempts to regulate intimate human relationships" and therefore if it "is to have any real influence on family behaviour it is more likely to be at the conceptual level - through what it attempts to tell us about desirable or acceptable models of family life."<sup>115</sup> Bainham suggests that law's most potent symbolic weapon is its use of language. He cites the views of Sir Roger Omrod who describes the process whereby a phrase, with constant repetition becomes accepted as a principle. In order for this metamorphosis to take place the phrase must be "felicitous" and "probably must also epitomise an idea for which there are receptive minds."<sup>116</sup> Bainham gives as an example the "no order principle" but it may be that the phrase "saving saveable marriages" has the potential to achieve the metamorphosis described above.

Law is thought to facilitate and legitimate different kinds of behaviour.<sup>117</sup> Phillips argues that "law embodies, imposes and reinforces the moral values of society."<sup>118</sup> Melton and Saks see law as a "moral educator," as primarily announcing social norms rather than changing them and in so doing providing "cues for moral behaviour."<sup>119</sup> There is some debate, as yet unresolved, as to whether law alters behaviour or whether altered behaviour brings about calls for a change in the law.<sup>120</sup>

Gallanter, in a highly persuasive piece, concludes "Law operates increasingly through indirect symbolic controls - by radiating messages rather than imposing physical coercion."<sup>121</sup> Dewar agrees, indicating that modern law is concerned "to steer behaviour in a general rather than a specific way."<sup>122</sup> Melton and Saks view the symbolic aspects of law as being like appeals to conscience in that they carry no penalty as such but are designed instead to prick the conscience. They conclude, "although the research available is still rather skimpy, the studies of the attitudinal effects of law and the effects of appeals to conscience suggest that moral declarations often may be more effective than threats of punishment in eliciting changes in values and behavior." However they qualify this by saying "the efficacy of moral statements, especially those embedded in laws and rules, is based on the information they provide about consensual values and social contingencies. When experience provides a very different message, the efficacy of hortatory appeals is likely to diminish or even disappear accordingly."<sup>123</sup> This analysis may be crucial to the question of

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<sup>114</sup> Barlow, A., Duncan, S., Evans G., and Park, A. (2002) 'Just a piece of paper- marriage and cohabitation in Britain', *British Social Attitudes Survey: Public Policy, Social Ties, 18<sup>th</sup> Report, 2001/2 Edition*, Chapter 2, National Centre for Social Research, News Report.

<sup>115</sup> Bainham, *supra* note 88, p.2

<sup>116</sup> *ibid.* p.4

<sup>117</sup> Barlow and Duncan Part II *supra* note 10, p.135

<sup>118</sup> Phillips, *supra* note 12, p.18

<sup>119</sup> Melton, G. and Saks, M. (1986) 'The Law as an Instrument of Socialisation and Social Structure', in G. Melton (ed.) *The Law as a Behavioral Instrument, Nebraska Symposium on Motivation 1985*, vol. 33, p.236

<sup>120</sup> Bainham, *supra* note 88, p.2

<sup>121</sup> Galanter, M. 'Law Abounding: Legislation around the North Atlantic', *M.L.R.*, vol 55, January 1992, No 1, p.24.

<sup>122</sup> Dewar, *supra* note 15, p.483

<sup>123</sup> Melton and Saks, *supra* note 119, p.262

whether the law can be harnessed to modify marital behaviour. The answer, if there is one, would seem to lie in law's symbolic powers. It may be that the law can indeed radiate appropriate messages in order to modify marital behaviour but only modestly and only if the behaviour sought to be modified is not too deeply entrenched. A commitment to the institution of marriage appears already to be firmly established<sup>124</sup> and therefore it would seem that the law could be utilised to reinforce the seriousness and permanence of the marital commitment. Higher expectations regarding what marriage should provide are now so firmly established that altering them significantly is likely to yield few positive results. Instead the Government should radiate a message where commitment to individual marriages is emphasised and a climate fostered in which recourse to marital counselling at an early stage becomes the norm.

#### 4.5 Social Norms.

An appreciation of the way in which social norms influence and mould attitudes is crucial to an understanding of the efficacy of law in modifying behaviour. As Melton notes understanding how law affects behaviour and using this understanding to foster change in behaviour requires an understanding of the forces that shape the law and the contingencies needed to achieve behavioural change.<sup>125</sup> Social norms are one such contingency.

Ross cites Weber's view that norms or "maxims" "govern the constant or stable components of a social relationship."<sup>126</sup> Ross's view is that "most instances of behaviour that can be regarded as "stable" or uniformly patterned may have a normative dimension."<sup>127</sup> In Ross' view human "action is at least partly explicable through an identification of the norms that individuals use, on the one hand, to evaluate and to "orient" or modify their own social action and, on the other hand, to evaluate and act upon the action, social or otherwise, of others."<sup>128</sup> Ross defines a social norm as a norm, which "requires at least one party in specified circumstances to engage in a course of social action aimed at satisfying the expectations of at least one other party." Norms therefore determine, at least in part, the way in which individual members of a society are expected to act in a given situation and contain elements of predictability and stability. Social norms are a "reference point" ... for the purpose of evaluating and orienting human action."<sup>129</sup> They will usually however only be one of a number of complex considerations that motivate particular actions and it is often difficult to discern whether a person is acting normatively since that which motivates an individual is not always transparent.<sup>130</sup>

Ross suggests that much human behaviour is orientated by reference to legal norms (Hart notes that legal systems may owe their existence to this fact) but cautions that often the way in which the state interprets human behaviour and the viewpoint of the individual may render "one point of view unrecognisable when juxtaposed against the other." Barlow and Duncan<sup>131</sup> and Eekelaar<sup>132</sup> have also noted the gulf between the way in which the state and the individual may interpret the individual's action in a given situation. Barlow and Duncan found that people do not make decisions as "rational economic man" as the Government assumes.<sup>133</sup> As Clulow puts it "the view of people as consistently rational beings has its limitations, especially in stressful circumstances."<sup>134</sup> A proper appreciation of how individuals

<sup>124</sup> see Barlow and Duncan Part II, supra note 10, p.136 and Barlow, Duncan, Evans and Park supra note 114

<sup>125</sup> Melton supra, note 13, p.xxiii

<sup>126</sup> Ross, H. (2001) *Law as a Social Institution*, p120

<sup>127</sup> *ibid.* p.119

<sup>128</sup> *ibid.* p.121

<sup>129</sup> *ibid.* p.137

<sup>130</sup> Eekelaar, Uncovering Social Obligations supra note100, p.13

<sup>131</sup> Barlow and Duncan Part II supra note 10, p.129

<sup>132</sup> Eekelaar, J. (1999) 'Family Law: keeping us "on message"' *C.F. L.Q.R. Vol 11, at No 4*, pp. 395-396.

<sup>133</sup> Barlow, A and Duncan, S. (2000) 'Supporting families? New Labour's communitarianism and The 'rationality mistake': Part 1', *J.S.W.F.L.*, vol. 22(1), p.24

<sup>134</sup> Clulow supra note 31, p.23. See also Hale, supra note 2, p.131

actually make decisions must be crucial to how effective legal change will be in orientating behaviour in the desired direction.

If social norms act as the "reference point" by which individual behaviour is orientated then to what extent can law hope to modify behaviour? How far can law expect to alter behaviour if the law does not reflect prevailing social norms? If law must reflect social norms to be truly effective then can it be said to alter behaviour at all? Is it not, in a sense simply self-perpetuating the status quo? Melton quotes Judge David Bazelon's (1982) view that "the law ... is seldom the spearhead of social evolution; it merely conforms to and ratifies changes in society and social perceptions."<sup>135</sup> Similarly Walker notes, "[f]amily law is directly influenced by public opinion and social behaviour: it usually follows rather than leads," usually with a considerable time lag.<sup>136</sup> Eekelaar sees law as announcing rather than changing social norms.<sup>137</sup> If law does simply follow then its effect on behaviour is likely to be minimal. In Melton's view however, whilst law's primary function is as an expression of the community ethic it also makes symbolic statements as to what is good which have a hortatory effect on individuals and society.<sup>138</sup> The critical movement believes that the law can be proactive in that "the law itself constitutes and defines the social world to which it relates."<sup>139</sup> The reality is likely to be somewhere between the opposing views expressed above. Whilst Glendon's analysis that law is often more reactive than proactive would appear accurate it is nevertheless in constant interaction with events (and one might add norms) rather than there being a cause and effect relationship between the two.<sup>140</sup> The law can do more than passively respond, it can, over time, through the language used and its symbolic function begin to shape public perceptions and behaviour, provided that that particular law is not too out of step with prevailing social norms. Undoubtedly the law will be most effective when it works in conjunction with social norms. Each in a sense is inextricably linked with and affects the other. The law will shape the initial formation of social norms but social norms are not static entities existing in a vacuum and as they change and develop law reform may be called for. Public opinion will then be shaped by any new legislation and in this way, a strong "reciprocal relationship between the enacted law, current theories of justice, and the social, economic and cultural background"<sup>141</sup> may be discerned.

Eekelaar suggests that governments do not tend to legislate where social norms are strong. There is only a need to legislate when the social norm favored by the state is thought to be weakening.<sup>142</sup> This may mean that the probability of the law affecting behaviour in the desired direction will also be weakened in this area since it will be seen to be going against any newly established norm. As Melton and Saks put it, "the efficacy of moral statements, especially those embedded in laws and rules, is based on the information they provide about consensual values and social contingencies. When experience provides a very different message, the efficacy of hortatory appeals is likely to diminish or even disappear accordingly."<sup>143</sup>

In Australia, the Family Law Reform Act 1995, introduced private law children provisions analogous, in many respects, with the Children Act 1989. The aims of the Act were to "promote a normative standard of parenting behaviour for those whose relationships had

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<sup>135</sup> Melton, *supra* note 13, p. xviii

<sup>136</sup> Walker, 'Divorce Reform and The Act', *Final Evaluation Report*, *supra* note 8, p. 17

<sup>137</sup> Melton and Saks, *supra*, note 119, p. 236

<sup>138</sup> Melton *supra* note 13, p. xviii

<sup>139</sup> Eekelaar, J. (1989) 'What is 'Critical' Family Law?' *L.Q.R.* volume 105 April p.244. Reynolds and Mansfield also note that marriages "institutional aspects have proved more robust than many suppose." Reynolds and Mansfield *supra* note 52, p. 10.

<sup>140</sup> Glendon, *The Transformation of Family Law* *supra* note 16, p. 242

<sup>141</sup> Stone, quoted in Walker, 'Divorce Reform and The Act', *Final Evaluation Report*, *supra* note 8, p. 18

<sup>142</sup> Eekelaar, *Family Law and the Responsible Citizen* *supra* note 100, p. 21-22

<sup>143</sup> Melton and Saks, *supra* note 119, p. 262

broken down"<sup>144</sup> and to "affect an attitudinal shift."<sup>145</sup> To assist in achieving this aim, in early 1996 "a major education campaign was undertaken by the Government with the assistance of the Family Court and the legal profession to inform the community about the changes in attitude and perception that the Reform Act was intended to bring about."<sup>146</sup>

In 1999 Rhoades, Graycar and Harrison researched the extent of change in the legal culture, legal practice and community expectations following the change of legislation. Whilst this research deals exclusively with children matters and not divorce, it is useful in that it provides in depth analysis of the success of another jurisdiction's attempt to "effect an attitudinal shift" by means of a change of legislation. The researchers found that the numbers of applications under the reformed legislation increased substantially. This reflects the situation following implementation of the Children Act 1989 where the numbers of applications for contact orders increased 117% between 1992-96.<sup>147</sup> It provides a cautionary tale for the British Government regarding the limited effect of a change in legislation on the attitudes and expectations of society, even when the Government has engaged in an extensive "education programme" in order to try to get its message across.

If law is to be utilised effectively to modify behaviour then the limits of the law must be appreciated. Law is unlikely to change behaviour that is already deeply entrenched within the fabric of society. That is not to say that law is entirely ineffective in this area. In the family arena there needs to be a recognition, for example, that the social norm in favour of marriage for life, at least in theory, is still strong<sup>148</sup> but that the social norm of higher marital expectations is so deeply entrenched that no change in the law to try to reverse this is likely to be tolerated or effective. These two factors should therefore lead the government to develop substantive law and wider social policies which will enhance marital quality by, for example, providing appropriate marital support when needed and by establishing economic, housing, welfare and employment policies which will ease the pressures on modern families. Working with prevailing social norms in this way rather than trying to reverse them is likely to be the most effective way of supporting families.

In summary, it is impossible to accurately assess the extent to which law can affect behaviour since it is so interwoven into our social fabric and culture that any regard for it may often be on a subconscious level and cannot neatly be isolated from the other factors which govern the decision-making process. As Glendon has eloquently put it, "law is a brightly coloured filament in the connective tissue of the modern social order,"<sup>149</sup> and as she states later, "[a] country's law, like its art, religion, economy and history, both effect and is affected by the culture in which it arises, and though the effects of law are modest, they are not always trivial."<sup>150</sup> Difficulties in precisely measuring effect does not mean there is no effect or that policies should not be developed which "provide a responsible and responsive framework" and which "encourage a culture which both supports marriage and seeks to reduce conflict during and beyond marriage breakdown."<sup>151</sup> In the family law arena the symbolic effect of law is probably its most potent weapon. Law acts best when it "radiates" messages rather than when it tries to coerce a change in behaviour but is only likely to be effective to any extent when the message it chooses to radiate is not too out of step with the prevailing social norms.

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<sup>144</sup> Rhoades, H. Graycar, R. and Harrison, M. (1999) *The Family Law Reform Act 1995: Can Changing Legislation Change Legal Culture, Legal Practice and Community Expectations?* Family Court of Australia, Interim Report, p.6

<sup>145</sup> *ibid.* p.7

<sup>146</sup> *ibid.* p.5

<sup>147</sup> *ibid.* p.52

<sup>148</sup> Eekelaar, Family Law and the Responsible Citizen *supra* note 100, p.17

<sup>149</sup> Glendon, *The Transformation of Family Law* *supra* note 16, p.242

<sup>150</sup> *ibid.* p.312

<sup>151</sup> Walker, Whither the Family Law Act, *supra* note 19, p.3-4

## 5. The Effect of Divorce Law on Behaviour.

Most critics would appear to agree that the threshold of divorce is the least optimal time to attempt to save marriage.<sup>152</sup> This view is also expressed in, *Moving Forward Together*,<sup>153</sup> the findings of which have been endorsed by the Government. One must also query whether divorce law can actually have any negative effect on divorcing behaviour. Opinions are divided as to whether it can. Some would argue that a more permissive divorce law inevitably affects attitudes towards marriage and divorce negatively. Deech for example argues that, "although the relationship between the law and rates of breakdowns is by no means straightforward, credulity is strained if one continues to acquit the law itself of any effect in all this."<sup>154</sup> It is argued that divorce law reform inevitably leads to changes in ideas about the nature and permanence of marriage<sup>155</sup> as well as the expectations and intentions of those who marry.<sup>156</sup> However, whilst changes in divorce law may have a small effect on divorce rates, wider social change is likely to have a far more wide-reaching effect.<sup>157</sup> Rises may simply be as a result of the profoundly unhappy or already separated taking the opportunity to divorce which is afforded by more liberal divorce laws.<sup>158</sup> Gibson's analysis that modern divorce law has had little effect on divorce rates<sup>159</sup> and that neither prohibition nor severe restrictions will ensure marital harmony<sup>160</sup> appears to be an accurate summation. He supports his position by analysing 5-year birth cohorts between 1900 and 1944 which show rising rates of divorce with each cohort, regardless of whether the divorce law was eased or not.<sup>161</sup>

Rheinstein cites research by Broel-Plateris who found that whilst divorce rates were higher where divorce law was more permissive, separation without divorce was not.<sup>162</sup> In other words, divorce law might affect divorce rates but not the incidence of marital separation<sup>163</sup> – the real evil. Rheinstein therefore concludes, rightly so, that divorce restrictions exert a minor influence on divorce.<sup>164</sup> Marital breakdown is far more likely to be affected by prevailing social norms concerning individualism, commitment, expectations etc. and by the profound societal changes, in particular the greater participation of women in the workforce than by divorce law itself. Divorce law may affect divorce rates but separation rates are unlikely to be affected, and it is with separation rates that the Government ought to be concerned.

## 6. The Likely Effect of the Government's Proposals on Marital Behaviour.

Having examined the various ways in which the law may achieve a change in behaviour, there follows an examination of how the Government's specific proposals set out in the FLA might have affected attitudes and behaviour had they been implemented.

### 6.1 The Period for Reflection.

The Law Commission envisaged the mandatory waiting period, as being primarily for evidential proof of breakdown. However in the FLA its purpose had changed to giving the parties an opportunity "to reflect on whether the marriage can be saved and to have an

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<sup>152</sup> See supra notes 31-32.

<sup>153</sup> *Moving Forward Together* supra note 30, para 5.

<sup>154</sup> Deech, R. (1990) 'Divorce Law and Empirical Studies', *L.Q.R.*, vol.106, p.233.

<sup>155</sup> Mansfield, supra note 32, p.29

<sup>156</sup> *ibid.* p.30

<sup>157</sup> *ibid.*

<sup>158</sup> Clark, D. and Haldane, D. (1990) *Wedlocked? Intervention and Research in Marriage*, p.40

<sup>159</sup> Gibson, supra note 55, p.223

<sup>160</sup> *ibid.* p.224

<sup>161</sup> *ibid.* p.223

<sup>162</sup> Quoted in Rheinstein, supra note 1, p.306-7

<sup>163</sup> *ibid.* p.277

<sup>164</sup> *ibid.* p.291

opportunity to effect a reconciliation."<sup>165</sup> Eekelaar comments, "the structure is now avowedly viewed primarily as giving the parties an opportunity to explore the possibility of holding back from divorce, and making them aware that they are expected to use it in this way."<sup>166</sup> The Law Commission hoped that forcing people to face up to the consequences of their actions, "may become a more potent encouragement to remain together than the present system."<sup>167</sup>

The waiting period in itself is unlikely to have any substantial effect on reconciliation. Vaughan's research identified the process of making the marital problems "public" as presenting a barrier to reconciliation.<sup>168</sup> The waiting period is only likely to exacerbate this. Faced with the practicalities and difficulties of separate lives or using the period to effect the changes desired by the other party might, in a few cases, lead to reconciliation but this is likely to be the exception, unless more proactive action is taken during the waiting period. Even the former Lord Chancellor, Lord Irvine, commenting on the period for reflection and possible of reconciliation concluded "it is extremely doubtful in practice that that will prove productive."<sup>169</sup>

## 6.2 The Information Meeting.

The purpose of the information meeting as piloted was to ensure that people considering divorce have full information about the enormity of the step they are taking and the options available to them.<sup>170</sup>

The information meetings were generally well received, with 90% indicating that they were "glad that they had gone."<sup>171</sup> On an individual level the results of the information meeting pilots showed that for those who were uncertain as to whether their marriage was at an end, the emphasis on marriage support and counselling could be helpful but for those who were sure, this emphasis was often seen as an irrelevance and in certain circumstances patronising.<sup>172</sup>

The key criticism that those tasked with evaluating the meetings had was that of timing. Only a few marriages are likely to be saved when the meetings come so late in the separation process and when they could be viewed as the first step in obtaining a divorce.<sup>173</sup>

In terms of marriage saving, the findings of the Final Evaluation Report were not promising. Despite the fact that Model C information meetings had a particular emphasis on marriage saving 73% of Model C attendees said it had made no difference to the likelihood of divorce, 20% said it was now more likely and only 7% said it was less likely.<sup>174</sup> In addition 75 per cent of Model C attendees who claimed to be unsure about whether they wanted a divorce felt the information meeting had made no difference to their probability of divorcing and that where it had made a difference it tended to be in the direction of making divorce more, rather than less, likely.<sup>175</sup> McCarthy concludes that the information meeting is likely to have "limited impact"<sup>176</sup> in terms of marriage saving but points out that for many it was not the "first port of call" that it would be in an implemented system and therefore the results might be more favorable in an implemented system.<sup>177</sup>

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<sup>165</sup> Family Law Act 1996, s.7 (1)(a)

<sup>166</sup> Eekelaar, *Keeping Us On Message*, supra note 132, p.389

<sup>167</sup> *The Ground for Divorce*, supra note 21, para 5.25

<sup>168</sup> Vaughan, supra note 36, p.152

<sup>169</sup> Hansard, HL col 144, 20 November 1995

<sup>170</sup> Walker, *Final Evaluation Report Summary*, supra note 28, p. vii

<sup>171</sup> *ibid.* p.29

<sup>172</sup> *ibid.* p.79

<sup>173</sup> McCarthy, P., Walker, J. and Hooper, D. (2000) 'Saving Marriage- A Role for Divorce Law?' *F.L.* June, pp 413

<sup>174</sup> McCarthy, P. 'Saving Marriages: The Impact of Information Meetings' in *Final Evaluation Report*. P285-303

<sup>175</sup> *ibid.* p.296

<sup>176</sup> *ibid.* p.302

<sup>177</sup> *ibid.* p. 303



The evaluation also revealed "a consistent tension" between presenting information about marriage saving and divorce within the same meeting.<sup>178</sup> This difficulty was addressed in *Supporting Families* which suggested the use of two meetings, the first an individual one concentrating on marriage support and the second a group meeting dealing with finances, children's issues etc.<sup>179</sup>

The information meetings were effective in making some take stock and re-evaluate whether there was any future for their marriage and to "become more focused, more knowledgeable and more positive"<sup>180</sup> but, crucially, the conclusion of the Final Evaluation Summary Report is that, "unless people can be encouraged to access information about marriage support services earlier, when marriages first get into difficulty, the focus on saving marriages in the information meetings will be relevant to relatively few."<sup>181</sup> Walker points out that "there is growing evidence that effective behavioural change requires more than the mere provision of information and knowledge."<sup>182</sup> Whilst the provision of information is therefore an important and helpful tool, it is imperative that the Government combine this with an emphasis and encouragement to those with marital difficulties to seek help at an early stage if the information meetings are to have any real impact.

The Researchers have indicated that the Government's suggestion that 5% of marriages will be saved through use of information meetings is "a realistic estimate."<sup>183</sup> Given the misery that divorce causes even this number of marriages saved must be worth it.

### 6.3 The Meeting With a Marriage Counsellor.

The FLA provided for the parties to be given an opportunity to have a meeting with a marriage counsellor (MWMC) and they were to be encouraged to attend such a meeting.<sup>184</sup> The meeting would be free of charge for those eligible for non-contributory public funding through the Community Legal Service.<sup>185</sup> Those eligible to attend the MWMC free of charge may also have been entitled to ongoing marriage counselling during the period for reflection and consideration, or when that period had been interrupted.<sup>186</sup> The average take up of the MWMC was 12%<sup>187</sup> although less than half indicated that they had gone to the meeting in the hope of saving their marriage, 15% wanted help ending their marriage and one-third were hoping for help in coming to terms with the fact that their marriage was over. Many of those who went to marriage counselling directly after attending an information meeting were seeking help with the emotional trauma of ending the marriage rather than wanting to save it.<sup>188</sup>

When 250 attendees were subsequently followed up, around half indicated that they had attended the MWMC in the hope of saving their marriage and 24% of those were still together. The MWMC was also found to be very effective in "moving people on – enabling them to work on saving the marriage, or to go forward into the divorce process feeling more certain of what they want to do."<sup>189</sup>

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<sup>178</sup> Walker, *Final Evaluation Report Summary*, supra note 28, p.23

<sup>179</sup> *Supporting Families* supra note 29, para. 4.31-4.33

<sup>180</sup> Walker, *Final Evaluation Report Summary*, supra note 28, p.30

<sup>181</sup> *ibid.* p.37

<sup>182</sup> *ibid.* p.73

<sup>183</sup> McCarthy, Walker and Hooper, supra note 173, p.413

<sup>184</sup> Family Law Act 1996, s.8 (6)(b)

<sup>185</sup> *ibid.* s.8 (12)

<sup>186</sup> *ibid.* s.23

<sup>187</sup> Walker, *Final Evaluation Report Summary*, supra note 28, p.33

<sup>188</sup> McCarthy, Walker and Hooper, supra note 173, p.414

<sup>189</sup> McMullen, R. and McCarthy, P. 'Dealing with the Uncertainty' in *Final Evaluation Report*. pp.327-328

Just under half of those who went to a MWMC subsequently attended mediation. 72% said it had helped them gain a better understanding of their relationship, and 19% that it had helped them save their relationship.<sup>190</sup>

Walker suggests that if the emphasis is to be on marriage saving the focus of the counselling needs to be more "narrowly focused" with consideration given to limiting counselling to those who express a desire to save their marriage or who agree to come together.<sup>191</sup> That said, attendees clearly reaped other benefits from the meetings, most notably coming to terms with the end of the marriage that may reduce post separation conflict or help the stability of any subsequent relationship. Restricting attendance as Walker suggests would fail to help these people.

#### 6.4 Marriage Support Funding

The Lord Chancellor was to be given powers under the FLA, with Treasury approval, to make grants in connection with the provision of marriage support services and for research into the causes of and ways of preventing marital breakdown<sup>192</sup> having regard to the desirability of those services being available when first needed.<sup>193</sup> Mansfield describes this approach as "a turning point for family policy,"<sup>194</sup> providing an opportunity to see the saving of saveable marriages not just as effecting reconciliation for those already involved in the divorce process but as putting services in place to prevent marital breakdown in the first place. This approach is vital if marriages are to be saved.

On 25 November 1999, in response to the recommendations of Sir Graham Hart's report, commissioned by the LCD to review the funding of marriage support, the Lord Chancellor announced increases to marriage support funding so that in 2002-03 the LCD provided grants (core funding and for projects) of £5 million,<sup>195</sup> representing a real increase of about one third. Whilst this was in line with Hart's initial recommendations these had been revised on 23 June 1999 when Hart wrote to the Lord Chancellor indicating, in light of the uncertainties over implementation of Part II of the FLA, "my recommendation to increase spending by £1m a year over three years should almost certainly be significantly increased, to finance a higher level of preventive work as well as counselling around the time of marriage breakdown." Whilst the increase in funding is welcome it is likely that this will need to be significantly increased to reduce waiting times and ensure that affordable, accessible, timely provision of marriage support is available to those who need it.

*Moving Forward Together* identifies the core problems with the provision of marriage support at present as being, "too little, too late"; a lack of public awareness as to what enhances marital stability; the antipathy, embarrassment or stigma attached to seeking help; a lack of knowledge as to who to approach for help; problems with accessibility and the inappropriateness of the current "one size fits all" approach.<sup>196</sup> If the Government fully took on board these criticisms and adopted a fundamental change of mindset away from tertiary intervention towards primary intervention then this, more than anything examined above, is likely to achieve the aim of changing behaviour and saving marriages. The phraseology "saving the saveable marriage" implies intervention only when a marriage is in serious jeopardy and then attempting to salvage those deemed to be "saveable." The emphasis needs to be on preventative rather than crisis intervention. The Government needs to harness the power of the existing social norm in support of the institution of marriage and then use law's symbolic effect to develop a new discourse whereby stability in marriage is

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<sup>190</sup> Walker, *Final Evaluation Report Summary*, supra note 28, p.34

<sup>191</sup> *ibid.* p.37

<sup>192</sup> *ibid.* s.22 (1)

<sup>193</sup> *ibid.* s.22 (3)

<sup>194</sup> Mansfield, supra note 32, p.29

<sup>195</sup> *ibid.*

<sup>196</sup> *Moving Forward Together* supra note 30, para 5.3 See also Mansfield, supra note 32, p.29-33.

valued and seeking early assistance to enhance and maintain marital stability or to deal with any difficulties becomes the norm, the first port of call rather than the last.

## 7. Conclusions.

The Government needs to recognise that the use of law to effect behavioural change is limited, especially in the emotion-laden arena of family law. Utilising divorce law alone to try to affect an attitudinal shift, as the FLA would have done, is likely to be ineffective. Few marriages can be saved at the brink of divorce. That said, if the Government was to consider the impact on family stability when formulating a broad spectrum of social policies, this might, in the long-term, have a modest impact on the fostering of marital stability.

Substantive law has a role to play, albeit a modest one, in that its symbolic, declaratory effect may help produce an attitudinal shift in the long-term, if coupled with social, housing, economic and employment policies to provide supportive family environments. For substantive law to be effective in moderating behaviour it must work in harmony with social norms not against them. If the Government were to harness the power of the existing social norm in favour of commitment in marriage and radiate a message advocating recourse to counselling to enhance marital quality and deal with any difficulties at an early stage then in time a new social norm to that effect may develop. To be effective this will need to be backed by further increases to the levels of funding of marital support to ensure that timely, affordable, accessible and relevant assistance is given at the point of need. If the Government does all of this it can expect to see an effect, albeit a modest one, on human behaviour and marital stability.

## Chapter 4: The Way Forward.

*"I think the whole legal system is crackers. They spend so much money trying to put the divorce laws right, when what they should concentrate on is the marriage- marriage vows. The women go down the aisle in pink tulle and the men go down thinking, right, we've got something in bed and someone to replace mother..." divorced woman<sup>1</sup>*

In Chapter 2 the case for state intervention on the grounds of public interest in the otherwise private realm of the family is set out and in Chapter 3 it was shown that the law can have an effect, albeit a modest one, on human behaviour. The question then is how should future legislation and social policy be framed in order to achieve the Government's aims of saving the saveable marriage.

### 1. Is Divorce Reform Needed?

There is widespread agreement that attempting to save marriages using divorce legislation is likely to be unproductive.<sup>2</sup> If the primary aim of the Government is to support marriage could this therefore be done within alternative legislation? Is there an actual need for divorce law reform? Deech argues not.<sup>3</sup> She would however appear to be in the minority. Dame Brenda Hale, for example, summarising the more persuasive views of leading academics and researchers at a conference to discuss the future of the Family Law Act argues "no change is not an option, given the widespread acceptance that the present law is unsustainable."<sup>4</sup>

The present law can be criticised for failing to meet its aims of buttressing rather than undermining the stability of marriage and, when a marriage has irretrievably broken down, enabling the empty shell to be destroyed with the maximum fairness, and minimal bitterness, distress and humiliation.<sup>5</sup> It may even exacerbate the situation.

The present system is confusing in its need to prove one of the five facts, facts that may not reflect the true reason for the breakdown. It is discriminatory in that some may be forced to proceed on fault grounds to deal with divorce so that the court can make orders regarding the practical and financial aspects of the breakdown. It may be unjust as it implies that one party was solely responsible for the breakdown, which is rarely the case. It may distort the parties bargaining positions in that the party who is more desperate for the divorce may feel obliged to compromise their position on the financial settlement. It can be frustrating since it gives the parties false hope that there will be a thorough investigation into the cause of the breakdown and blame apportioned accordingly, which is not the experience of most. It can exacerbate hostility by forcing parties to make allegations against the other to obtain a 'quick' divorce, focusing attention on the other party's deficiencies and thereby reducing the chances of effecting a reconciliation and potentially escalating conflict, with negative consequences for any children involved.<sup>6</sup> Eekelaar draws attention to research showing that it is ten times more likely that a notice of intention to defend will be filed in unreasonable behaviour petitions than on adultery and two year

<sup>1</sup> Interviewee quoted in Davis, G. and Murch, M. (1988) *Grounds for Divorce*, p.30

<sup>2</sup> Walker, J. (2000) 'Whither the Family Law Act, Part II' p.3-4 and Clulow, C. (2000) 'Supporting marriage in the theatre of divorce,' p.23 both in The Rt. Hon. Lord Justice Thorpe and E. Clarke (eds.) *No Fault or Flaw The Future of the Family Law Act 1996*.

<sup>3</sup> Deech, R. (1990) 'Divorce Law and Empirical Studies', *L.Q.R.*, vol. 106, p.242

<sup>4</sup> Hale, Lady Justice. (2000) 'The Way Forward', in The Rt. Hon. Lord Justice Thorpe and E. Clarke (eds.) *No Fault or Flaw The Future of the Family Law Act 1996*, p.143.

<sup>5</sup> The Law Commission, *Reform of the Grounds of Divorce The Field of Choice*, 1966 Cmnd 3123, para. 15

<sup>6</sup> See generally Law Commission (1990) *The Ground for Divorce*, No. 192 and Herring, J. (2001) *Family Law* pp.88-90.

separation petitions together and that cases based on unreasonable behaviour are heavily over-represented in cases involving contested custody or access (as they then were) disputes.<sup>7</sup> Whether these cases simply involved a high degree of conflict that would have been present whatever ground the divorce proceeded on is unclear, but the allegations made in an unreasonable behaviour petition will do nothing to relieve the tension. Whilst the separation facts may not exacerbate conflict, they do put pressure on parties to physically separate, which may reduce the chances of reconciliation and they may distort the parties bargaining position if a recalcitrant spouse refuses to leave and the other spouse has no grounds to proceed on adultery or unreasonable behaviour. They too are therefore problematical. A final complaint is that the current system does little to save the marriage, the provisions regarding the Solicitor certifying whether he has discussed reconciliation and whether he has given details of organisations which can assist under the Matrimonial Causes Act 1973 being of very limited effect.<sup>8</sup>

Davis and Murch point out that with collusion between the parties and District Judge's practice of allowing petitions on unreasonable behaviour grounds to pass on relatively trivial grounds, the notion of fault is all but redundant in the present system.<sup>9</sup> Rheinstein who points to the "dual law of divorce" i.e. the difference between "law on the books" and "law in action" also notes this phenomenon.<sup>10</sup> Eekelaar suggests that the present system has worked because "it appears to retain moral scrutiny over the legal dissolution of marriage whilst in practice satisfying demand for consensual divorce." This is achieved "at the price of requiring the submission of allegations to a tribunal which is denied the means of verifying them." Eekelaar refers to this as a "shabby compromise".<sup>11</sup> Divorce reform is needed. Whether 'no-fault' divorce should replace the existing system will be discussed below.<sup>12</sup>

## 2. Aims.

The aims of the FLA, enshrined in principles set out in paragraph 1 of the Act, namely the support of marriage, encouragement to take steps, through counselling or otherwise to save marriages that have broken down, and the bringing to an end of those marriages that are irretrievable, with the minimum distress to the parties and children in such a manner as to promote a good ongoing relationship between the parties and any children and minimising costs appear unassailable. One might be concerned that the proposals are Treasury led, given the emphasis on minimising costs, although the reference is in relation to the divorce costs, not the marriage saving agenda. Successful marriage support is likely to need far greater cash injections than at present.

The aims are clearly ambitious and the difficulties of incorporating all the aims into a single 'first step', that is an information meeting, have been acknowledged.<sup>13</sup>

Clear aims require a clear understanding of the different stages of intervention. Preventative intervention in the marital arena recognises three levels of activity, primary, secondary and tertiary prevention. Mansfield defines these as follows,

"Primary prevention involves promoting healthy relationship; through education, skills training and information provision. The aim is to enable people to establish and sustain harmonious and cohesive relationships. Secondary prevention is aimed at limiting the intensity and duration of problems, for example early intervention at known stress points in married life, such as the birth of the first child. Tertiary prevention focuses on the

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<sup>7</sup> Eekelaar, J. (1984) *Family Law and Social Policy*, pp.46-47

<sup>8</sup> See *supra* Chapter 1, note 16

<sup>9</sup> Davis and Murch, *supra* note 1, p.147.

<sup>10</sup> Rheinstein, M. (1972) *Marriage, Stability, Divorce and the Law*, p.63

<sup>11</sup> Eekelaar, J. (1986) 'Divorce English Style: A New Way Forward?' J.S.W.L., p. 209

<sup>12</sup> See 7.1 below

<sup>13</sup> Walker, J. (2000), *Final Evaluation Report Summary*, p.2

treatment of existing problems with the aim of containing distress and limiting their effects.”<sup>14</sup>

Historically government intervention has concentrated on tertiary prevention.

It is generally recognised that attempting to save marriage on the brink of divorce is likely to have limited success. Whilst the Lord Chancellor’s Department has now recognised the urgent need for a shift of emphasis in marriage support from tertiary to primary intervention,<sup>15</sup> the very wording of the Principles to the FLA, *“that the parties to a marriage which may have broken down are to be encouraged to take all practicable steps, whether by marriage counselling or otherwise, to save the marriage”*<sup>16</sup> reveal the ‘tertiary intervention’ mentality behind the FLA. There must be a fundamental move towards primary intervention in any reformed legislation if there is to be any hope of saving marriages.

Divorce is not a discrete event but a process over time. Similarly marriages tend to break down over a period of years. It is imperative that steps are taken throughout the marriage to maintain its stability and that counselling is available at the start of the “uncoupling” process, not at the end.<sup>17</sup> The support of marriage and the achieving of a “good divorce” are quite distinct<sup>18</sup> and the aims of each should also be distinct.

The aims of effective marriage support should be to promote policies that enhance relationship quality, to provide affordable, accessible, tailored information and support at the point of need and to foster a culture whereby the seeking of such assistance, as a first resort rather than a last resort, becomes the norm.

The aims of effective divorce legislation should be to have a legal framework that provides information and support to those involved to help them understand the process (thereby relieving some of the anxiety involved) that encourages the negotiated settlement of issues wherever possible with the minimum distress and conflict and that promotes ongoing contact between parents and children, whilst minimising the potential risk to children or parents. Such aims mirror to a large extent the aims of the FLA.

### 3. Effective Marriage Support - Primary Intervention.

As outlined in Chapter 3 above, expectations about what marriage should provide are rising and people are becoming less willing to stay in a marriage that fails to meet these expectations. Stricter divorce law will not therefore ensure marital stability and the emphasis must be on enhancing and maintaining the quality of relationships. As with health care provision, a shift in emphasis from curing to preventing marital instability is likely to yield more positive results. So how might this be achieved?

#### 3.1 Pre-marital Support and Education.

Relationship training and education for family living should be provided in secondary education and the subject given appropriate weight in initial teacher training courses.<sup>19</sup> In this respect the statutory duty on headteachers and governors to ensure that children are taught about the nature of marriage and its importance for family life and the bringing up of

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<sup>14</sup> Mansfield, P. (2000) ‘From Divorce Prevention to Marriage Support’, in Thorpe, The Rt. Hon. Lord Justice and E. Clarke (eds.) *No Fault or Flaw The Future of the Family Law Act 1996*, p.31

<sup>15</sup> Moving Forward Together (2002) *A Proposed Strategy for Marriage and Relationship Support for 2002 and Beyond*, Advisory Group on Marriage and Relationship Support, para.7.5

<sup>16</sup> Family Law Act 1996, para 1(b)

<sup>17</sup> Vaughan, D. (1986) *Uncoupling, Turning Points in Intimate Relationships*, pp.194-195

<sup>18</sup> Walker, J. (2001) ‘Supporting the Principles of the Family Law Act,’ *Final Evaluation Report*, p.830

<sup>19</sup> Rheinstein, *supra* note 10, p.435

children<sup>20</sup> is to be welcomed although care must be taken to promote the importance of relationship stability, not simply marriage stability.

### 3.2 Marriage Preparation Courses

Measures that concentrate the attention of those about to marry on the responsibilities of marriage may give them better insight and therefore promote stability. A 1996 NOP study revealed that only 1 in 6 recalled having any sort of marriage preparation class, usually consisting of one or two sessions provided by the church which was marrying them.<sup>21</sup> Whilst Simons' research shows a slightly better outcome for those who attended pre-marital courses he cautions that this may be as a result of the greater commitment in the first place of those who agreed to attend. Those most in need are least likely to attend on a voluntary basis.<sup>22</sup> Mandatory attendance is unjustifiable.<sup>23</sup>

In 1997/8 the Government supported thirteen marriage support pilot projects<sup>24</sup> and has indicated its commitment to improving the provision of marriage preparation.<sup>25</sup> Whilst they may have some limited effect the role for such courses in terms of overall marriage saving policy is likely to be minor.

### 3.3 Pre-nuptial Agreements

*Supporting Families* considers making pre-nuptial agreements voluntary but legally binding as a means of encouraging people to consider the implications of marriage before embarking on it.<sup>26</sup> Lewis found little public appetite in favour of such agreements.<sup>27</sup> Of the 157 responses to this suggestion in *Supporting Families* 80 were in favour and 77 against.<sup>28</sup> As with marriage preparation pre-nuptial agreements are likely to play a limited role in future marriage support.

### 3.4 Reform of the Marriage Act

*Supporting Families* advocates reforms to the Marriage Act including Registrar's making available information about marriage and informing couples of pre-marriage support, changing notice requirements and personalising the marriage service.<sup>29</sup> All these measures aim to stress the importance of the marriage commitment. In 1999 reforms to the Marriage Act were introduced to require both parties to attend the registry to give notice at least 15 days before a marriage can proceed to try to avoid precipitous weddings.<sup>30</sup> Whilst any measures which cause people to consider more carefully the degree of commitment necessary for enduring marriages, these measures are largely cosmetic and are unlikely to have a significant effect on marital stability.

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<sup>20</sup> *Moving Forward Together*, supra note 15, para. 4.7

<sup>21</sup> Simons, J. (1999) 'Can Marriage Preparation Courses Influence the Stability of Marriage', in *High Divorce Rates: The State of the Evidence on Reasons and Remedies* (Lord Chancellor's Department), vol.2 Paper 5, p.2

<sup>22</sup> *ibid.* p.vi

<sup>23</sup> Turner advocates compulsory courses with permission to marry refused to those deemed unsuitable but this is unlikely to have any popular support. Turner, J.N. (1980) 'Entry into Marriage. Should it be Made More Difficult?' in J.M. Eekelaar and S.N. Katz (eds) *Marriage and Cohabitation in Contemporary Societies*, pp.139-140

<sup>24</sup> *Supporting Families*, (1998) A Consultation Document, Home Office, para. 4.18

<sup>25</sup> *ibid.* para. 4.19

<sup>26</sup> *ibid.* para 4.21-4.23

<sup>27</sup> Lewis, J. (1999) 'Marriage and cohabitation and the nature of commitment' *C.F.L.Q.R.*, Vol. 11, No 4, p.361.

<sup>28</sup> Responses to *Supporting Families*, Home Office (1999), para 4.6

<sup>29</sup> *Supporting Families* supra note 24, para.4.24-4.28

<sup>30</sup> Responses to *Supporting Families*, supra note 28, para. 6.1

### 3.5 A Statement of Rights and Responsibilities.

*Supporting Families* supports the preparation of a statement of rights and responsibilities in marriage and a similar one for cohabitation. This suggestion was welcomed by 91 of the 143 responses received. This may be helpful, especially to those who cohabit, as it should disabuse them as to the reality of the "common law marriage myth."

The measures outlined at 3.1 to 3.5 above all have the aim of concentrating attention on the rights and responsibilities of marriage by those about to embark on it. Potentially any measure that helps parties to reflect may be helpful in ensuring that they are ready to take on this step of commitment. Those unsure may choose not to proceed and thereby avoid a possible early divorce. It is however likely that these measures will be taken most seriously by those who already have a high degree of commitment to their partner and to marriage. Though welcome their impact on saving marriages is not likely to be significant. Whilst the case for making attendance at pre-marital classes compulsory is very difficult to make out, the Government should consider making the provision of information concerning the matters outlined in 3.1 to 3.5 compulsory. For example those who register to marry could be provided with an information pack including a statement of rights and responsibilities, information on prenuptial agreements and marriage preparation materials which the parties would be encouraged to go through together. Details of how to obtain face-to-face guidance for those who want it could be included as could information on marriage as a lifelong cycle, identifying key potential stress periods and emphasising the importance of obtaining early help with details of how to obtain this.

### 3.6 Marriage Enhancement Courses.

The Government's recent proposals in relation to marriage concentrate on assistance prior to marriage or once a marriage is in difficulty. There needs to be greater emphasis on maintaining and enhancing marital felicity generally. At present most marital enhancement courses tend to be linked to a religious group. Whilst these are welcome and should be supported there should also be nationwide government provision of such courses. The Government may wish to consider offering these either free of charge or at generous entry levels say once every 3 years or more often on, for example, the referral of a party's G.P. A culture, in which the public view the enhancing of relationship stability as a priority and are willing to make use of such resources as these, must be the most effective way of retaining marital stability.

In America the White House has recently announced a budget of \$300m a year for programmes to strengthen marriage. These programmes include teaching "relationship skills" to unmarried couples who are expecting a baby, and providing "marriage-skills training" to married people who want to get on better.<sup>31</sup> The effectiveness of such measures should be monitored closely and consideration given to introducing such measures in the UK on a voluntary basis. Any relationship training should be available to both the married and unmarried.

Clarke and Haldane recognise that there is evidence that a high proportion of married couples want to achieve a degree of mutual satisfaction in their relationships.<sup>32</sup> This desire should be built on and steps taken to ensure that couples are able to achieve this through such measures as marriage enhancement courses, rather than the current tendency to only offer support once a marriage has reached crisis point.

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<sup>31</sup> The Economist, (12.07.03) 'Get me to the church on time', p.33

<sup>32</sup> Clark, D. and Haldane, D. (1990) *Wedlocked? Intervention and Research in Marriage*, pp.166-7



#### 4. Secondary Intervention.

Secondary intervention aims to reduce the length and intensity of marital difficulties. Developments, which might ameliorate the chances of its success, will include the following-

##### 4.1 Early Support.

A primary objective of intervention must be to provide support as soon as a problem is identified. Vaughan has shown that marriages breakdown asymmetrically over a period of time. The problems felt by one party are often revealed to no one, not even the partner until the initiator has travelled a considerable distance down the road of "uncoupling."<sup>33</sup> The provision of support at this stage may prove too late for many couples. Vaughan identifies the breaking of this asymmetry and the early revelation of dissatisfaction as a possible means of saving more relationships.<sup>34</sup> Parties need to be provided with information about the benefits of stable relationships, the importance of seeking early support and the factors that can erode relationship intimacy. If the trend towards inter-generational divorce continues this will become even more important for successive generations.<sup>35</sup>

##### 4.2 Interdisciplinary Approach.

If the intensity and duration of problems is to be limited then this will require an early identification of the problem not only by the parties but also by any professionals they come into contact with so that referrals between agencies can be made as appropriate and the necessary assistance given without delay. To that end there is a growing recognition of the need for interdisciplinary cooperation.<sup>36</sup>

With the exception of the Tavistock Institute of Marital Studies there have been few sustained efforts at achieving an interdisciplinary approach to practice, training and research in marital support.<sup>37</sup> The FLA seeks to promote better interdisciplinary cooperation between professionals.<sup>38</sup> To help achieve this Local Interdisciplinary Forums, (LIDF's) overseen by the National Interdisciplinary Forum were set up during the information meeting pilots, "to promote interdisciplinary cooperation, communication and understanding through the coordination of professional interests."<sup>39</sup> There is strong support for the continuation of LIDF networks<sup>40</sup> and "widespread agreement that whatever steps are taken in respect of divorce reform, multi-agency and interdisciplinary cooperation offers potentially significant benefits for the efficient running of a responsive family justice system."<sup>41</sup>

An interdisciplinary approach is likely to be just as necessary for both primary and tertiary intervention.

##### 4.3 Training for Professionals.

If professionals are to be expected to identify marital problems in their clients/patients then this will require better training. Significant opportunities exist within the fields of social work and health care in particular for identification of marital difficulties but no priority is given to such issues in the primary training of doctors, social workers, psychologists, nurses etc. so

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<sup>33</sup> Vaughan, supra note 17, p.60

<sup>34</sup> ibid. pp.194-195

<sup>35</sup> Rodgers B. and Pryor, J. (1998) *Divorce and Separation: the outcomes for children*. Joseph Rowntree Foundation, p.29

<sup>36</sup> Mansfield, supra note 14, p.32

<sup>37</sup> Clark and Haldane, supra note 32, p.98

<sup>38</sup> McCarthy, P. and Kain, J., (2001) 'The Views of Professionals' in *Final Evaluation Report*, p.741.

<sup>39</sup> Walker, J. 'Establishing Pilots' in *Final Evaluation Report*, p.38

<sup>40</sup> Walker, J. and McCarthy, P. 'Looking to the Future', in *Final Evaluation Report*, p.855

<sup>41</sup> ibid.

these opportunities are often missed.<sup>42</sup> Clarke and Haldane list the constraints on marital work in the social services as "worker anxiety and lack of confidence, organisational and statutory frameworks, and client inhibition."<sup>43</sup> Better primary training of social workers in this area could address the confidence issues.

The church has traditionally been seen as a source of counselling and support for those with marital difficulties and it needs to ensure that clergy receive adequate training to respond appropriately.<sup>44</sup>

"Marriage Matters" advocates the setting up of marital training and development groups to be locally organised but centrally funded<sup>45</sup> to tackle the problems of lack of appropriate training for professionals who encounter relationship problems in their clients/patients. This has not happened but should be a priority.

One Plus One's detailed survey of primary health care professionals found that they were regularly exposed to patient's relationship problems but that such problems were not felt to be a "core concern" and were not dealt with systematically. Health professionals made few referrals to counsellors, their knowledge of local counselling services was very limited and they had little contact with counsellors.<sup>46</sup> The researchers found that primary care staff felt in a good position to identify problems but lacked confidence about managing them.<sup>47</sup> This must be addressed as a matter of priority since a health visitor's role in a patient's life coincides with a known point of relationship stress, namely the birth of a child. Those who had attended One Plus One's 'Brief Encounter's' project for the training of health visitors to screen new mothers in the postnatal period for relationship problems felt more confident about asking patients about relationship issues.<sup>48</sup> The research identified community psychiatric nurses, district nurses, practice nurses, midwives, health visitors and G.P's as those health professionals best placed to come across relationship problems. Their report recommends providing health professionals with additional skills and information to help them respond to relationship distress in their patient's more effectively, making local information on services more easily available and developing counselling services within the NHS for easier referring.<sup>49</sup> A local version of the Lord Chancellor's Department's (now the Department of Constitutional Affairs) recently published national directory on support services, may assist primary health care workers to refer patients to counselling.<sup>50</sup>

#### 4.4 A Life-stages Approach.

Most couples will experience some degree of marital distress at some point in their marriage. Key 'triggers' of particularly vulnerable periods have been identified as including, the birth of children, children leaving home, periods of illness, unemployment or the need to care for an elderly relative.<sup>51</sup> A life-cycle approach that recognises and targets assistance at these known stress periods is likely to be more effective than just general provision of support.<sup>52</sup>

The One Plus One initiative in 1998 which gave health visitors a 4 day training programme in screening mothers for relationship difficulties at their baby's routine 6-8 week check proved

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<sup>42</sup> Clarke and Haldane, *supra* note 32, p.118

<sup>43</sup> *ibid.* p.108

<sup>44</sup> *ibid.* p.112

<sup>45</sup> Marriage Matters (1979) Report of the Working Party on Marriage Guidance.

<sup>46</sup> Ayles, C. and Reynolds, J. (2001) *Identifying and managing patients' relationship problems in primary care: The perspective of health professionals and counsellors.* One Plus One Marriage and Partnership Research, p.3

<sup>47</sup> *ibid.* p.4

<sup>48</sup> *ibid.* p.5

<sup>49</sup> *ibid.* p.48

<sup>50</sup> Lord Chancellor's Department, (2003) Marriage and Relationship Support Directory

<sup>51</sup> Simons, J. (1999) 'How Useful is Relationship Therapy?' in *High Divorce Rates: The State of the Evidence on Reasons and Remedies* (Lord Chancellor's Department), vol.2 Paper 6, P.28

<sup>52</sup> *ibid.* See also Mansfield *supra* note 14, p.32

"strikingly successful."<sup>53</sup> Similar such initiatives for all midwives, health visitors and relevant primary care professionals should be a funding priority. The possibility of expanding the role of Health Visitors has been acknowledged and a £1m fund set up to investigate this.<sup>54</sup>

There is tremendous potential to build on the good beginnings of such courses as the 'Brief Encounter's' course. Steps should be taken to include training in the initial training of primary health professionals to help them identify relationship difficulties, broach these sensitively with their patients and deal with them as appropriate or refer them to counselling as required.

Information on relationship strain and how to obtain support to deal with this could be provided at ante- or post-natal classes or on the registration of a birth.

## 5. Tertiary Intervention.

Whilst a shift away from the current emphasis on tertiary intervention is called for there will remain a need for such support. Much of the following is relevant to all forms of support but is particularly relevant to tertiary intervention because of the crisis nature of such intervention.

### 5.1 Changing the Culture

Askham found that most people chose not to confide their marital problems.<sup>55</sup> Simons cites a Mori poll indicating that only 20% of divorced respondents had utilised marriage counselling, 11% had sought support from a solicitor, 10% friends and 49% had sought no help at all. Of those who sought no help, 48% indicated that they saw therapy as inappropriate.<sup>56</sup> A recent survey of 3500 of their clients by ACCORD, the Irish counselling service run under the direction of the Catholic Bishops of Ireland, showed that 54% spent up to six months thinking about coming to counselling and the remainder spent longer.<sup>57</sup> It is crucial that the reluctance to attend counselling is addressed and the sense of admission of failure and perceived stigma attached to therapy are reversed. There needs to be a fundamental change of culture so that the seeking of marital support becomes the first step when a marriage hits difficulties. The measures discussed below at 5.2 to 5.5 may help reverse this ambivalence towards marital therapy as might a public education campaign, preferably backed by media support.

### 5.2 Accessibility.

The easier the access to counselling the more likely it is that it will be taken up. Difficulties in accessing counselling and waiting periods involved caused some of the information pilot attendees to be reluctant to use counselling.<sup>58</sup> Clarke and Haldane complain that at present there are "many doors" to counselling and that, "in practice these are often poorly signposted or difficult to open."<sup>59</sup> The piloting of FAIN's which aim to provide a "single door entry" to marriage support services is a welcome development provided there is adequate advertising and funding within any implemented service.

Dealing with issues of location and provision of a service at times to fit in with modern lifestyles will also improve accessibility.<sup>60</sup>

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<sup>53</sup> Simons, Relationship Therapy, supra note 51, p.28

<sup>54</sup> *Supporting Families*, supra note 24, para.1.30

<sup>55</sup> Askham, J. (1984) *Identity and Stability in Marriage*, p.166

<sup>56</sup> Simons, Relationship Therapy, supra note 51, p.28

<sup>57</sup> Cited in The Bulletin, (May 2003) One Plus One, vol. 7(2), p.2

<sup>58</sup> McCarthy, P. 'Saving Marriages: The Impact of Information Meetings' *Final Evaluation Report*, pp.293 and 301

<sup>59</sup> Clarke and Haldane supra note 32, p.101

<sup>60</sup> Moving Forward Together, supra note 15, p.21

Being able to telephone a centralised number was appreciated by a number of MWMC attendees who were subsequently followed up.<sup>61</sup> Given the large number of marital support agencies that exist it may be very helpful if people were able to phone an easily remembered centralised number for any marriage support, not just with respect to a MWMC. They could then be given details of support available locally from which they can choose depending on their ethnicity, religious background etc.

Speed of access is likely to be as crucial as ease of access. Even a short delay between contacting an agency and attending an appointment can make the difference between a person attending or not. Following up MWMC attendees McCarthy and Mitchell found that 10% of those who wished to go on into counselling had to wait more than 4 weeks for a counselling appointment.<sup>62</sup> Of the 101 people (followed up by Mitchell and McCarthy) who attended a counselling session after the MWMC, 73% went on to attend a second session. Of those who didn't two said it was because they had to wait too long for a second appointment.<sup>63</sup> Reducing waiting periods generally is likely to require extra training and availability of staff in the voluntary sector agencies that will in turn require a significant increase in the current Treasury budget of £5m towards marriage support.

### 5.3 Affordability.

Of the 101 people in the follow up survey referred to in paragraph 5.2 above six indicated that they were put off from attending a second counselling session because of costs.<sup>64</sup> However of the 240 attendees contacted by McCarthy and Mitchell after the MWMC, which was free of charge, 68% indicated that they would have been prepared to pay a charge. This may reflect the relatively high satisfaction levels with the meeting. Whether they would actually have attended had a fee been payable is impossible to judge.<sup>65</sup>

At present the eligibility for free counselling is based on eligibility for a legal funding certificate, which has parsimonious qualification levels. Perversely, eligibility is limited to those already involved in divorce proceedings. For those who, sensibly, choose to seek assistance before matters get to the stage of proceedings or for those outside the financial eligibility limits, the cost implications can be prohibitive. If the Government really does wish to see a sea-change in attitudes towards counselling then it will need to seriously rethink its policy towards the funding of marital support. It should consider offering a service whereby counselling can be accessed when needed by those who are married and by couples who live together, free of charge, as in New Zealand.<sup>66</sup> If this is felt to be unfeasible, consideration should be given to at least providing entry levels which are much more generous than at present. Whilst this would involve significant increases in expenditure on funding of marital support, this must be seen in the context of current funding of £5m. per annum set against the estimated £5b. cost to the Government of marital breakdown each year.<sup>67</sup> If marriages could be saved by use of early, free counselling then the enormous cost of marital breakdown may be reduced.

### 5.4 Timeliness.

Support must be timely not only in the sense of being readily available without undue delay but also available at the point of need, not when the legal system dictates it ought to be available. When it is known that the earlier marital counselling is sought the more effective it

<sup>61</sup> Mitchell, S. 'Working Towards Reconciliation', *Final Evaluation Report*, p.351 and pp.354-355

<sup>62</sup> McCarthy, P. and Mitchell, S. 'Meeting with a Marriage Counsellor', *Final Evaluation Report*, p.321

<sup>63</sup> *ibid.* p.323

<sup>64</sup> *ibid.*

<sup>65</sup> *ibid.* p.317

<sup>66</sup> Roberts, M. (1997) 'New Zealand's Family Court- Reflections for the Family Law Act of England and Wales', *I.J.L.P.F.*, vol.11, pp. 247-249.

<sup>67</sup> Hart, Sir G. (1999) *The Funding of Marriage Support: A Review*, Lord Chancellor's Department, Para. 9.

is, why does the FLA restrict free counselling to those who are eligible to “a time when a period for reflection and consideration is running in relation to the marriage; or is interrupted for the purposes of trying to effect reconciliation (but not for a continuous period of more than 18 months)?”<sup>68</sup> Since the only rule regarding the timing of attendance at an information meeting is that it occurs at least 3 months before the filing of a statement of marital breakdown, this can effectively be accessed at any time. An invitation to a MWMC will also be given at the information meeting. Is it seriously the Government’s intention to lose any momentum towards reconciliation which the information meeting and MWMC has produced by then restricting access to further counselling to those who take a step towards divorce by filing a notice of marital breakdown? If so this anomaly must be urgently rectified within any proposed new legislation. In New Zealand the Family Proceedings Act 1980 provides mechanisms which allow for early intervention in a troubled marriage by allowing couples, both married and cohabiting, to apply for help through the Family Court and gain access to free counselling and mediation services.<sup>69</sup> The Government should consider adopting such a system in the UK enabling couples to access support whenever needed. Consideration might be given to curbing the cost of such measures by, for example, restricting access to free counselling to those who have not previously made use of them. On balance however this should be avoided. Emotions cannot be neatly packaged. Just because counselling has been attempted previously does not mean that parties committed to further counselling at a later date should be penalised by having their eligibility restricted.

### 5.5 Tailored

The Lord Chancellor’s Department has now recognised that a “one size fits all” provision of counselling is not the best approach.<sup>70</sup> In relation to the information meeting pilots, the frustrations of both the presenters and the attendees regarding the lack of tailoring of information has been documented.<sup>71</sup> If information is to be useful it must be relevant. Similarly with counselling this must be tailored to the individual needs of the attendee. Different styles and content may be needed depending on such factors as whether the parties have children, their age, length of marriage, ethnic, cultural or religious background etc.

## 6. Social Policy.

If the Government is serious in its commitment to supporting marriage then it will need to consider the impact on the family of a wide range of social policy measures. Askham suggests that whenever social trends or changes are recorded it could be useful to assess the influence of these trends or changes upon the behaviour of married couples and on the stability of their union.<sup>72</sup> The following are some important areas where policy developments may strengthen the family.

### 6.1 Economic Policy.

Discussing measures to reduce what he describes as the “socially toxic environment” to which children are exposed in modern times, Garbarino states that we must insist “on

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<sup>68</sup> Family Law Act 1996 s.23(2)(a) and (b)

<sup>69</sup> Walker, J. (2001) ‘Evidence from Other Jurisdictions,’ in *Final Evaluation Report*, p.794

<sup>70</sup> *Moving Forward Together*, supra note 15, Summary, Background and Research Part A.

<sup>71</sup> Walker, ‘Whither the Family Law Act,’ supra note 2, p.7

<sup>72</sup> Askham, supra note 55, p.193

economic policies that put family well-being first and foremost among political priorities."<sup>73</sup> Not surprisingly financial pressures are a known causation factor in marital breakdown.<sup>74</sup>

Some commentators have criticised the abolition of the Married Couple's allowance, arguing that this sends a message that marriage is not valued.<sup>75</sup> However there appears to be no evidence that fiscal measures have any effect on marriage rates.<sup>76</sup> Additionally, anticipation of poverty does not appear to be a deterrent to divorce.<sup>77</sup> Glendon notes that 10 years of experimental income maintenance programmes in America do not appear to have had the desired effect in maintaining marital stability.<sup>78</sup> She states that the influence of economic factors on marital breakdown is diffuse and is mediated by demographic and psychological factors.<sup>79</sup> However, known risk factors such as early union formation and childbearing are linked to poor socio-economic groups and therefore policies to raise the human capital of such groups may delay early union formation until people are better placed materially to enter and maintain relationships. Similarly, policies to improve and maintain adequately paid employment prospects are likely to have a positive effect on marital stability.<sup>80</sup> The economic strain on families, especially those with young children, is recognised in *Supporting Families*. The effect of economic policy on marital stability is difficult to isolate from other effects and therefore difficult to measure. The Government should nevertheless make supportive, family friendly economic policies a priority.

## 6.2 Housing Policy.

Homelessness and inadequate housing have been shown to be a significant factor leading to children being voluntarily accommodated.<sup>81</sup> Poor and overcrowded housing have also been linked to high levels of divorce.<sup>82</sup> The Government's 'Right to Buy' policy has exacerbated the housing problems of those most vulnerable to marital difficulties, i.e. those in the lowest socio-economic groups, especially since the rebuilding of council accommodation has not kept pace with the numbers of houses sold.<sup>83</sup> Inadequate housing is likely to put yet further strain on those in disadvantaged circumstances. The effect on families should therefore be a factor in the development of housing policy.

## 6.3 Employment Policy.

The creation of stable employment conditions will ease pressures on families. Employment policies must be responsive to changes in the workplace with increasing numbers of women returning to work after the birth of children. Employment policy needs to reflect that child-care is now a dual responsibility.<sup>84</sup> Flexible working arrangements can help families balance work and home commitments and have been found to be beneficial to employers in recruiting and retaining staff.<sup>85</sup> The Government is beginning to recognise the importance of

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<sup>73</sup> Garbarino, J. (1995) 'Growing Up in a Socially Toxic Environment: Life for Children and Families in the 1990's' in Melton, G.B. (ed.) *The Individual, the Family, and Social Good: Personal Fulfilment in Times of Change*, Nebraska Symposium on Motivation, Vol.42, p.15

<sup>74</sup> Gibson, C.S., (1994) *Dissolving Wedlock*, p.138 See also Mansfield, P. Reynolds, J. and Arai, L., (1999) 'What Policy Developments would be Most Likely to Secure an Improvement in Marital Stability?' in *High Divorce Rates: The State of the Evidence on Reasons and Remedies* (Lord Chancellor's Department), vol.2 Paper 7, p.36

<sup>75</sup> Responses to *Supporting Families*, supra note 28, para 2.2

<sup>76</sup> Eekelaar, J. (2000) 'Uncovering Social Obligations: Family Law and the Responsible Citizen' in Mavis Maclean (ed.) *Making Law for Families*, p.23

<sup>77</sup> McAllister, F. (1999) 'Effects of Changing Material Circumstances on the Incidence of Marital Breakdown', in *High Divorce Rates: The State of the Evidence on Reasons and Remedies* (Lord Chancellor's Department), vol.1 Paper 2, p.36

<sup>78</sup> Glendon, M.A. (1981) *The New Family and the New Property*, p.137

<sup>79</sup> *ibid.* p.vi

<sup>80</sup> *ibid.* p.40

<sup>81</sup> Eekelaar, *Family Law and Social Policy*, supra note 7, p.200

<sup>82</sup> Gibson, supra note 74, p.119

<sup>83</sup> *ibid.* p.121

<sup>84</sup> Mansfield, Reynolds and Arai, supra note 74, p.36

<sup>85</sup> Responses to *Supporting Families*, supra note 28, para. 3.3

work/life balance and it should continue to build on the measures set out in the White Paper, *Fairness at Work*, and the steps already taken to implement the European Union Working Time and Young Worker's Directives and Part Time Directives (implemented 1998) and to improve parental leave and maternity rights.<sup>86</sup>

#### 6.4 Fostering a Sense of Community.

Tyler and Degoe point to the link between a sense of community and willingness to defer to authority and acceptance of group values.<sup>87</sup> This may have important implications in the Government's attempts to modify behaviour and save marriages.

Glendon argues that communities are the "little platoons" in which families' flourish and that by pursuing policy in such areas as welfare, urban renewal and industry without considering the impact on families, governments have unintentionally eroded such communities. She advocates a more "ecological approach" arguing that by attending to the health of small-scale communities governments will help strengthen families.<sup>88</sup> Melton similarly emphasises the need for supportive family environments.<sup>89</sup> These views are particularly germane.

Rheinstein notes that marriages tend not to founder because of temporary setbacks but as a result of the compounding effects of poverty, poor housing, poor education and lack of recreation.<sup>90</sup> If the Government is serious about strengthening the family then it must adopt policies to encourage family-friendly workplaces, to alleviate financial and work pressures and to create supportive nurturing community environments. These measures are much more likely to create stable families than any changes in divorce legislation.

### 7. Legislating to Maintain Marital Stability.

#### 7.1 The Removal of Fault.

Existing legislation does nothing to effectively support marriage. In those circumstances would the no-fault system envisaged by the FLA be any more successful at maintaining stable marriages? Are there any alternatives? Parkman suggests the introduction of divorce by mutual consent as the sole ground<sup>91</sup> with fault based on a high standard such as "clear and convincing evidence" being allowed.<sup>92</sup> He also states that there is a case for no-fault divorce being allowed during the first year of marriage or until the wife is pregnant whichever is the earlier since the potential costs at that stage, would, he argues, be low.<sup>93</sup> Parkman's proposals are flawed however in that they would unfairly advantage the bargaining position of the spouse who least wanted the divorce and the higher standard of fault required may exacerbate conflict.

Critics of pure no-fault divorce argue that it leads to "no responsibility" divorce, giving out a message that "marriage is a short-term option with no specific obligations."<sup>94</sup> There is not however any evidence to suggest that making divorce easier to obtain encourages

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<sup>86</sup> *Supporting Families*, supra note 24, para. 3.9

<sup>87</sup> See Tyler and Degoe supra Chapter 3, notes 111-113

<sup>88</sup> Glendon, M.A. (1989) *The Transformation of Family Law, State, Law, and Family in the United States and Western Europe*, p.308

<sup>89</sup> Melton, G. (1995) 'Personal Satisfaction and the Welfare of Families, Communities and Society.' in Melton, G.B. (ed) *The Individual, the Family, and Social Good: Personal Fulfilment in Times of Change*, Nebraska Symposium on Motivation, Vol. 42 p.xx

<sup>90</sup> Rheinstein, supra note 10, p.241

<sup>91</sup> Parkman, A.M., (1995) 'The Deterioration of the Family: A Law and Economic Perspective', in Melton, G.B. (ed). *The Individual, the Family, and Social Good: Personal Fulfilment in Times of Change*. Nebraska Symposium on Motivation, Vol. 42 p.45

<sup>92</sup> *ibid.* p.49

<sup>93</sup> *ibid.*

<sup>94</sup> Deech, supra note 3, p.244

irresponsible behaviour, nor does it appear to threaten the belief in marriage as a life-long commitment.<sup>95</sup> Conversely, more draconian divorce law does not reduce the incidence of marital breakdown.<sup>96</sup> District Judge's practice of allowing behaviour divorce on relatively flimsy grounds and the degree of collusion between the parties when both are intent on obtaining a "quick" divorce is such that divorce by consent is the practical reality at present in any event.<sup>97</sup> Given the cost consequences of defending a divorce (legal aid having been all but removed from defended divorces), the significant increase in time frames and greater emotional anxiety which a defended trial inevitably causes and the limited success of those who choose to defend, very few divorces are now defended. In practice, since the vast majority of cases are dealt with by Special Procedure, there is already effectively divorce by consent or unilateral demand, or at least divorce without a contest. The notion of fault is spurious. Its removal would relieve the parties from entering the process in the false hope that there might be any meaningful trial of their complaints. Whilst it must be acknowledged that the removal of fault is likely to lead to a sense of injustice,<sup>98</sup> the reality at present is that the system appears to offer justice but fails to deliver it in practice which is potentially even more frustrating for those involved in the process. Arguably all a switch to no fault divorce does is to bring the "law on the books" in line with the "law in action."<sup>99</sup>

In 2000 almost 69% of divorces were obtained on the basis of adultery or unreasonable behaviour.<sup>100</sup> These can be obtained in less than half the time that a divorce under the amended law as proposed by the FLA would take. A 12-month minimum delay in many ways would make divorce harder. In addition the compulsory attendance at an information meeting (possibly two if the proposals suggested in *Supporting Families* are implemented)<sup>101</sup> together with the compulsory attendance at a mediation intake meeting and the possible denial of a Legal Services Commission's funding certificate for those deemed to be refusing, unreasonably, to attend mediation indicates that the system under the proposed amendments would be more prescriptive, not less. No-fault divorce does not mean easy divorce.

It must be appreciated that the removal of fault from the legislation will not eliminate conflict. The factors that led to the breakdown and the anger, loss and bitterness which they engender, will not disappear<sup>102</sup> but at least they might not be unnecessarily exacerbated.

Some would argue that no-fault divorce leads to divorce rate increases.<sup>103</sup> This is too simplistic an explanation of the divorce explosion since the 1970's. Changes in marital expectations, greater social acceptability of divorce, and the increased economic autonomy of women, allowing them to leave unsatisfactory marriages are likely to have had a far greater impact on divorce rates than a liberalisation of divorce law.

Sweden introduced no-fault divorce in January 1974.<sup>104</sup> In 1967 the divorce rate had been significantly higher than in England and Wales at 1.36 per thousand of the population

<sup>95</sup> Walker, J. (1991) 'Divorce – Whose Fault? Is the Law Commission Getting It Right?' F.L., p.234. For contrary view see Christensen, B. 'Taking Stock: Assessing Twenty Years of 'No Fault Divorce' ' in R. Whelan (Ed) *Just a Piece of Paper? Divorce Reform and the Undermining of Marriage* 1995, P.61

<sup>96</sup> Rheinstein, supra note 10, p.406

<sup>97</sup> Davis and Murch, *Grounds for Divorce*, supra note 1, p.148

<sup>98</sup> ibid. p.93. See also Christensen, quoting Wallerstein, who found a high degree of anger and a sense of injustice in almost 40% of women and 30% of men 10 years after they divorced in the first year of America's no fault legislation, supra note 96, p.65

<sup>99</sup> Rheinstein, supra note 10, p.91

<sup>100</sup> Office of National Statistics, *Marriage, divorce and adoption statistics, 2000*, Series FM2 no.28 Table 4.21

<sup>101</sup> *Supporting Families*, supra note 24

<sup>102</sup> Day Sclater, S. and Piper C. (1999) 'The Family Law Act 1996 in Context', in S. Day Sclater and C. Piper (eds.) *Undercurrents of Divorce*, p.4

<sup>103</sup> Deech, supra note 3, p.233 and Wheelan, R. (1995) 'Introduction' in R. Whelan (Ed) *Just a Piece of Paper? Divorce Reform and the Undermining of Marriage*, p.2

<sup>104</sup> Tottie, L. (1980) 'The Elimination of Fault in Swedish Divorce Law,' in J.M.EEKELAAR and S.N. KATZ (eds), *Marriage and Cohabitation in Contemporary Societies*. p.131



compared to 0.88 in England and Wales.<sup>105</sup> By 2001 the Swedish rates were lower than the UK's at 2.4 and 2.6 per thousand respectively, although the lower rate can be accounted for in part by Sweden's lower marriage rate - 4.0 per thousand compared to 5.1 in the UK. Germany also operates on a no fault basis and had a lower divorce rate than the UK in 2001 at 2.4 per thousand. Its marriage rate is more comparable at 4.7 per thousand.<sup>106</sup> Clearly, strict no fault does not necessarily mean that divorce rates will be higher than in countries where fault remains. The social factors outlined above are far more likely to determine a country's divorce rate. The majority of studies into the effect of divorce law on divorce rates in Europe show that any effect has been a temporary one. Studies in Australia, which has had no fault divorce since 1975, have also shown that its effects are negligible.<sup>107</sup>

Ellman has shown empirically that divorce rates in the USA have reduced since the introduction of no-fault divorce.<sup>108</sup> He notes that the divorce rate was 2.1 per thousand people in 1958, 2.9 by 1968 and peaked at 5.3 in 1979, that is the divorce rates began climbing a decade before no-fault was introduced, peaked at about the time of the nationwide introduction of no-fault divorce and has since declined to 4.5 per thousand in 1996, 15% lower than in 1981.<sup>109</sup> He records that the marked regional variations in divorce rates do not reflect the specific divorce laws of different regions, pointing out that the South and the North East, the two areas most resistant to no-fault divorce legislation, in fact have the highest and lowest divorce rates, respectively.<sup>110</sup> The figures quoted by Ellman showing that the divorce rate has actually declined since the introduction of no fault divorce in America are effective in silencing those that would argue that no fault divorce leads to an increase in divorce. In all the circumstances the speedy introduction of no-fault divorce seems the most appropriate way forward.

## 7.2 The Role of the Legal Profession.

Better use should be made of solicitors potential role in marriage saving. Contrary to popular belief solicitors are often the first resort when a marriage hits difficulties, not the last.<sup>111</sup> The wording of section 12 of the FLA which would allow the Lord Chancellor to make rules requiring a legal representative to inform their client of the availability of marriage support and mediation<sup>112</sup> is an improvement on the existing section 6 requirements which simply require the Solicitor to certify whether they have discussed reconciliation. Under any amended legislation it should be a compulsory requirement to give such information unless there are cogent reasons not to do so. In such cases the Solicitor, on the certificate filed at court, should confirm the reasons.

## 7.3 The Period for Reflection and Consideration.

Whilst some may use the compulsory waiting period for its intended purpose, namely to reflect on whether the marriage is capable of being saved and to take up the offer of counselling etc. in order to achieve a reconciliation, many will have come so far down the road of uncoupling by the time the proceedings are commenced that any amount of time for reflection is not going to achieve a reconciliation. For such parties the compulsory 12-month waiting period may prove a fruitless exercise. There is some merit in keeping a minimum period to prevent precipitous divorce and to emphasise the importance placed on marriage but the Government may wish to consider reducing this to 3 months from the date that the

<sup>105</sup> Rheinstein, *supra* note 10, p.30

<sup>106</sup> Office of National Statistics (2003) Social Trends No. 33, Table 2.11

<sup>107</sup> Mansfield, Reynolds and Arai *supra* note 74, p.15

<sup>108</sup> Ellman, I. (1997) 'The Misguided Movement to Revive Fault Divorce and Why Reformers Should Look Instead to the American Law Institute', *I.J.L.P.F.*, vol.11, pp.219-220. For detailed discussion of Ellman's findings see Chapter 3 *supra* notes 238-239

<sup>109</sup> *ibid.* p.219-220.

<sup>110</sup> *ibid.* p.220

<sup>111</sup> Davis and Murch *supra* note 1, p.55.

<sup>112</sup> Family Law Act 1996, s12 (2)

Statement of Marital Breakdown is filed (six months in total given the period between the information meeting and filing of the Statement) provided all financial and children issues are agreed to the satisfaction of the Court before a divorce order is made. There is a danger that the party more desperate for the divorce to be concluded quickly may be pressurised to agree a more unfavourable outcome on either financial or children matters than they might have achieved within contested proceedings but if a Judge were required to approve any agreement before a divorce order was made then the potential for this would be minimised.

#### 7.4 Information Meetings.

Information meetings, for many, come too late to save their marriage.<sup>113</sup> If the information meeting is seen as the first step in obtaining a divorce than it is unlikely to be successful in saving marriages.<sup>114</sup> However, for those unsure as to whether their marriage has ended, targeted information meetings may be useful and might provide the impetus both parties need to work on saving their marriage.

The giving of information should be empowering for the recipient. Within the context of divorce proceedings it will hopefully enable them to take stock and take steps to save their marriage or move forward into the divorce process with a better understanding of the consequences. Whilst the information meetings may not save many marriages they may be useful in achieving the aims of the good divorce namely in reducing conflict and promoting an on-going relationship between the parents and their children thereby aiding the recovery of both. A good recovery for the adults and the children and reduced bitterness and conflict is likely to have a positive effect on any subsequent relationships formed by the parents and indeed by the children in later life. Whilst the current relationship might not be saved, subsequent ones might be.

A revised form of compulsory information meeting should therefore be implemented within any subsequent legislation. The format suggested by the authors of the Information Pilot Summary Report would be effective in meeting the shortcomings of the system piloted to date whilst still fulfilling the Part 1 aims. They suggest an individual, tailored meeting where information is given orally regarding the purpose of the meeting, the ground rules, domestic violence and an invitation to a MWMC given. Thereafter, the attendee could choose from a range of other topics to cover depending on their personal circumstances.<sup>115</sup> The meeting would then be a more relevant experience for attendees than the piloted meetings. Where appropriate the focus of the meeting could be entirely on saving the marriage with all other information, save the oral information outlined above, being given in leaflet form. Supporting Families suggests holding an individual meeting specifically dealing with saving saveable marriages and a second more general one.<sup>116</sup> Arnold expresses concern that to require someone to attend two meetings could be seen as an overly "nannying" approach<sup>117</sup>. The need for two separate meetings could be avoided if the format outlined above is adopted. Those who choose an exclusively marriage-saving focus to the meeting could be given the option of attending a further more general meeting if they subsequently wish to proceed to divorce proceedings.

The Government should advertise and promote the information meeting, emphasising the tailored nature of the meeting and the focus on marriage saving where required. Parties should be encouraged to attend at an early stage of any marital difficulties so that the

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<sup>113</sup> McCarthy, P. ((2001)'Provision of Information and the Prevention of Marriage Breakdown' in *Final Evaluation Report*. p.395

<sup>114</sup> *ibid.* p.394

<sup>115</sup> Walker, *Final Evaluation Report Summary*, *supra* note 13, p.81

<sup>116</sup> *Supporting Families*, *supra* note 24 at para.4.31

<sup>117</sup> Arnold, W. (2000) 'Implementation of Part II of the Family Law Act 1996: The Decision not to Implement in 2000 and Lessons Learned from the Pilot Meetings.' in Thorpe, The Rt. Hon. Lord Justice and E. Clarke (eds.) *No Fault or Flaw The Future of the Family Law Act 1996*, p.16

meeting could become the first step in obtaining support to help save the marriage (where appropriate) and not the first stage of divorce.

#### 7.5 The Meeting with a Marriage Counsellor and Subsequent Counselling.

The MWMC should also be adopted within any amended legislation. Several attendees expressed appreciation for the fact that an invitation was specifically given to attend a MWMC and a centralised number could be contacted<sup>118</sup>, thus easing accessibility. Both these measures should be continued within any subsequent legislation.

The Government should consider offering the meetings and any subsequent counselling without charge to all, or at least at very generous entry levels.

12% of information meeting attendees went on to attend a MWMC<sup>119</sup> but only 48% went with a view to saving their marriage. Of the remainder 15% wanted help in ending their marriage and 32% wanted help in coming to terms with the ending of their marriage.<sup>120</sup> Given the Government's stated aim of saving marriage, to help fund the extra cost of providing the service free of charge, there is some merit in restricting free attendance at a MWMC and subsequent counselling to those parties who are willing to attend together and who indicate they wish to save their marriage. Those wishing to attend for the other reasons listed could be free to do so at a small fee. Difficulties in accurately assessing motivation of attendees could be a problem but, in reality, if the parties attend together it is almost certainly going to be with a view to saving their marriage. On balance however the Government should be encouraged to take a more long-term view of the effect of counselling and provide free counselling to all those who seek it and are eligible. Counselling to come to terms with the ending of a relationship could assist in achieving two of the Government's other aims, namely helping to promote good post divorce parenting relationships and reducing bitterness. Allowing for free counselling on this basis would acknowledge the crucial need to deal effectively with the anger and hostility which divorce inevitably engenders whilst acknowledging that the divorce arena is not the most appropriate or effective forum for dealing with these issues. Assisting a party in coming to terms with the ending of a relationship will not save that relationship but the insights gained might make future relationships less vulnerable to breakdown.

It is crucial that access to free counselling following attendance at a MWMC is available at the point of need and not restricted to those who have initiated proceedings. Research shows that counselling is more effective in saving marriages if taken up before the parties separate.<sup>121</sup>

Several attendees spoke of their frustration at there being a change of counsellor between MWMC and counselling.<sup>122</sup> Consideration should be given to ensuring continuity of counsellor if the attendee wants this to save costs being wasted on rehearsing what has already been said to the first counsellor. The counsellors themselves support this measure.<sup>123</sup>

#### 7.6 Children's Issues.

As with the Children Act 1989 parents should be encouraged to agree arrangements for the children without the court's specific intervention wherever possible. Parents should be encouraged to make use of parenting plans but, to maintain flexibility, their use should

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<sup>118</sup> Mitchell, *supra* note 61, pp.349 and 355

<sup>119</sup> McCarthy and Mitchell, *supra* note 62, p.309

<sup>120</sup> *ibid.* p.313

<sup>121</sup> McCarthy *Saving Marriages* *supra* note 58, p.209

<sup>122</sup> Mitchell, *supra* note 61, p.359

<sup>123</sup> *ibid.* p.381

remain voluntary although the existing Statement of Arrangements for Children form could be expanded and revised so that it more closely reflects the parenting plans utilised in, for example, Alberta, Canada.<sup>124</sup>

Attendance at mandatory parenting courses is required in several jurisdictions before an application for a court order can be made. Whilst this can cause resentment, attendance is generally appreciated.<sup>125</sup> Whilst there is perhaps some merit in a judge having discretion to order attendance in high conflict cases where attendance was felt to be in the child's best interest, generally speaking the case for compulsory attendance in all cases is difficult to make out, especially since research on the intensive six-hour Parenting Programme adopted in Alberta showed that it did not significantly change behaviour.<sup>126</sup>

In most cases it will be unnecessary to put a child through the trauma of speaking to a judge directly within contested proceedings, since the child's views can be adequately conveyed to the court by the Children and Family Reporter appointed to represent their interests.

It is known that parent-child relationships can be adversely affected by lack of explanation and insensitivity to the child's feelings at the time of the separation and that those children who received clear explanations from parents about what was happening and why recovered best.<sup>127</sup>

Whilst leaflets specifically for children were included in the information packs handed out at the information pilots, only 16% of parents passed these on to their children.<sup>128</sup> When questioned children expressed a clear view in favour of being able to directly access other sources of information and support themselves, for examples through a dedicated 'helpline' or the internet.<sup>129</sup> Information could also be made available through schools, youth clubs, libraries etc.

### 7.7 Effective Legislation.

Whilst it must be recognised that only a minimal amount of marriages will be turned back from divorce as a result of steps taken to try to save marriage within divorce proceedings, it is nevertheless important that the Government's commitment to marriage is spelt out. Constantly radiating the message of the fundamental centrality of strong, stable family units may strengthen the existing social norm in favour of commitment to marriage and thereby enhance marital stability. A statement akin to the "principles" in section 1 of the FLA is therefore advisable within any reformed legislation. The aims and objectives of the FLA have much to commend themselves and the proposed reforms with respect to removal of fault, a period for reflection, attendance at information meetings, Meetings with a Marriage Counsellor, ongoing counselling etc. should be implemented as a matter of priority, subject to the provisos here outlined. However, research and common sense tells us that divorce legislation is an ineffective forum for achieving a marriage saving agenda. The focus of such legislation is wrong and the scope too limited. Other pieces of legislation dealing with marriage tend to be buried in older, technical, little heard of laws that therefore remain at the level of policy. The Government needs to take a holistic view of marriage. Such an approach may have more impact if the Government was to consolidate existing law into a comprehensive "Marriage Act" setting out in unequivocal terms its commitment to marriage

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<sup>124</sup> Walker, when reviewing the use of parenting plans in other jurisdictions concluded, "Most parents regard parenting plans as a good idea, but there are barriers to using them, and making them a legal requirement may be a dubious route to take. Many parents have difficulty planning for the longer term and want to retain flexibility in their arrangements." Walker, *Evidence from Other Jurisdictions*, supra note 69, p.805

<sup>125</sup> *ibid*

<sup>126</sup> *ibid.* p.799

<sup>127</sup> Rodgers and Pryor supra note 35, p.15

<sup>128</sup> Walker, *Final Evaluation Report Summary*, supra note 13, p.50

<sup>129</sup> Douglas, G., Murch, M., Robinson, M., Scanlan, L. and Butler, I. (May 2001) Children's Perspectives and Experience of the Divorce Process FL p 376.

as a lifelong process and providing comprehensive help and support throughout the course of a marriage enshrining in law the measures outlined above. Such legislation should also include a commitment, together with substantive provisions, to support cohabitants.

### 8. Achieving "the Good Divorce."

As well as saving marriages the Government has also made clear that it wishes to set standards for good divorcing behaviour. Those standards would be to minimise conflict, to promote contact and to adequately consider the needs of any children involved. Generally speaking, a close relationship with both parents is associated with a positive adjustment in children after divorce<sup>130</sup> and should therefore be promoted unless contrary to the child's best interests in a particular case.

The above aims are clearly laudable although the Government needs to be mindful that the rhetoric of the harmonious divorce and the dominant welfare discourse effectively seeks to deny the intense emotions which are a normal part of the separation process<sup>131</sup> and which may be essential to the recovery of the parties.<sup>132</sup>

Whilst establishing standards for the "good divorce" is immensely important, a detailed analysis of what those standards should be is outside the scope of this work save to say that if the standards outlined above were achieved then this should assist the recovery of the adults and children involved and may ease the pressures on any subsequent relationships that the adults might form or smooth the children's transition into adulthood and thereby provide some security for any relationship they might subsequently form, thereby helping to promote stability in future unions across the generations.

### 9. Research Priorities.

These are indeed exciting times in the development of family law. The Government has expressed a strong commitment to supporting marriages. The momentum achieved in recent years must not be lost. The role of research in achieving the Government's aims must not be underestimated. The importance of research into the causes and prevention of marital breakdown and its funding is recognised in section 22 of the FLA.<sup>133</sup> Sir Graham Hart's recommendations on the funding of Marriage Support, which have been accepted by the Government, include a recommendation that the LCD should develop a strategy for research into marriage support<sup>134</sup>

The priority in research should be on primary not tertiary issues, on the factors that maintain stable relationships. Priorities should therefore include research assessing the common factors in long term, stable relationships; a better understanding of the meaning of commitment in marriage and cohabitation, and its effect on the relative stability of the union,<sup>135</sup> together with research to discover what factors can act to reduce the level of commitment or *value* attached to marriage.<sup>136</sup> Research into how to communicate effectively to the general public the causes of marital disharmony and the factors which inhibit spouses ability to manage tension and the benefits of early intervention in the event of problems to try to create a new way of viewing counselling should also be pursued.

<sup>130</sup> Maidment, S. (1984) 'The Matrimonial Causes Act, s. 41 and the children of divorce: the theoretical and empirical considerations' in *State, Law and the Family. Critical Perspectives* edited by M.D.A. Freeman, p.172

<sup>131</sup> Dewar, J. (1998) 'The Normal Chaos of Family Law' M.L.R. Vol. 61, No 4, July, p.469

<sup>132</sup> see generally, Brown, J. and Day Sclater, S. (1999) 'Divorce: A Psychodynamic Perspective', in S. Day Sclater and C. Piper (eds.) *Undercurrents of Divorce*, pp.153-155, Vaughan, supra note 17, p.43, Day Sclater, S. (1997) 'Narratives of Divorce', J.S.W.F.L., vol.19(4), p.423 and 435 and Day Sclater, S. (1999) 'Experiences of Divorce', in S. Day Sclater and C. Piper (eds.) *Undercurrents of Divorce*, p.179

<sup>133</sup> Family Law Act s.21 (1)(b) and (c)

<sup>134</sup> Hart, supra note 67, para.53

<sup>135</sup> Reynolds, J. and Mansfield, P. (1999) 'The Effect of Changing Attitudes to Marriage on its Stability', in *High Divorce Rates: The State of the Evidence on Reasons and Remedies* (Lord Chancellor's Department), vol.1 Paper 3, p.40

<sup>136</sup> Hart, (1976) *When Marriage Ends: a Study in Status Passage*. p.62

## 10. Cohabitation.

The Government, in their pursuit of saving saveable marriages could be accused of ignoring the fundamental shift in attitudes and lifestyle choices in favour of cohabitation over recent decades. Should the emphasis not now be on saving the saveable relationship, whether married or not? This is a problematical area that raises strong views on all sides of the political spectrum.

Cohabiting couples choose for a variety of private reasons to reject or postpone the public commitment of marriage. Provided that decision is a free and informed decision then why should they have forced upon them the legal responsibilities of marriage?<sup>137</sup>

Whilst the same rights and responsibilities should not apply equally to cohabitants as those who marry, there is nevertheless a strong case for the Government to be taking proactive steps through a public education campaign to dispel as far as possible the "common law marriage" myth so that decisions to cohabit are not made in ignorance of the consequences. Such information needs to be presented in a neutral, balanced manner in such a way that those who choose to cohabit are not made to feel stigmatised or pressured into marriage in any way. In addition there is no reason why those who cohabit should not have as much encouragement and support to enhance and maintain their relationship as the married. If, as some statistics would imply, their relationship is more vulnerable than that of the married they arguably have greater need for support, particularly if children are involved. This support should extend to the provision of information; with information meetings potentially being developed aimed specifically at the cohabiting. It should also cover an invitation to a meeting similar to the Meeting with a Marriage Counsellor (Meeting with a Relationship Counsellor?) and ongoing counselling, available free of charge on the same basis as it is to those who are married, if there are children of the relationship.<sup>138</sup> The meagre support for cohabitants offered somewhat grudgingly by *Supporting Families* is simply not justifiable or sufficient.<sup>139</sup>

There is strong public support for the institution of marriage and it ought to be supported but this does not have to be to the detriment of cohabiting relationships. In the current climate of relationship breakdown both need and deserve government support.

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<sup>137</sup> For similar views see Booth, Dame Margaret, "Can the Law Make Us More Committed?" in *Commitment: Who Cares? One Plus One Marriage and Partnership Research Conference*, 25 October 1999, p.55 and Cretney, S. (1980) 'The Law Relating to Unmarried Partners From the Perspective of a Law Reform Agency', in J.M. Eekelaar and S.N. Katz (eds.) *Marriage and Cohabitation in Contemporary Societies*, pp. 357-367

<sup>138</sup> Family Law Act 1996, s.8 (6)(b), s.8 (12) and s23

<sup>139</sup> *Supporting Families* supra note 24, para. 4.15

## Chapter 5: Conclusions.

The present Labour Government has made it clear that it sees the support of the family as fundamental to its domestic policy. It appears to take the view that not only should it attempt to modify behaviour in the traditionally private realm of the family but that such change is possible. Working on the basis that people are fundamentally rational, it assumes that if its message regarding family life is effectively communicated then people will respond as anticipated. The Government is either oblivious to or simply choosing to ignore the fact that people do not always apply rational reasoning to decisions regarding their private lives thereby perpetuating what Barlow and Duncan have referred to as "the rationality mistake."<sup>1</sup> If the Government is to see any success in its 'saving saveable marriages' agenda then a more nuanced approach to family policy, one which is sensitive to the profound changes witnessed in the family in recent decades, will need to be adopted.

There are those who will view any overt interference in the sacred, private world of the family as Orwellian and an anathema. However, there are strong public policy reasons to justify such intervention, most notably the huge emotional costs to the protagonists (adults and children) in any family breakdown, together with the enormous cost to the public purse. Adults who divorce or separate have higher mortality rates, higher rates of mental illness and depression, higher suicide rates and are more prone to suffer alcohol and drug dependency than their married counterparts.<sup>2</sup> The children of parents whose relationship breaks down perform less well educationally, have poorer employment prospects, are more likely to suffer clinical depression at a later age, are more likely themselves to divorce and are more likely to suffer from poor self esteem than children from intact families. They are also disproportionately represented in low- income families. These factors, as well as the huge public cost of divorce, estimated to be running at approximately £5b. per annum<sup>3</sup> are sufficient to justify public intervention in an otherwise quintessentially private realm.

If the Government is to successfully intervene it must be realistic about the limitations of the law in saving marriages. There have been fundamental changes in the structure of the family in recent times. Most countries of western tradition have witnessed a distinct move from a largely institutional view of marriage to a companionate view where the ties are emotional rather than economic and where the bond is more intense yet more fragile.<sup>4</sup> The greater economic freedom of women and the changing, more conditional nature of commitment has led to greater expectations of what marriage should provide and greater willingness to leave if the marriage is failing to meet such expectations. These changes are unlikely to be reversible and any attempt to shore up marriage by trying to reaffirm its more traditional aspects is doomed to failure.

Attempts to use traditional methods of law enforcement such as coercion, deterrence or incentives do not translate effectively to the realm of family law. If law is to have an effect then it will be a symbolic one. One, which, through the language used, will radiate a message supporting the importance of marriage stability.

The Government will need to harness the positive effect of the existing social norm in which commitment to marriage is the ideal and work with, not against, prevailing social norms if its marriage saving aims are to be achieved. As Glendon puts it, "when the law is in harmony with other social forces, it will synergistically produce a greater effect in combination with them than it

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<sup>1</sup> Barlow, A and Duncan, S. (2000) ' Supporting families? New Labour's communitarianism and The 'rationality mistake': Part 2', *J.S.W.F.L.* vol. 22(2), p.129

<sup>2</sup> See *supra* Chapter 2 notes 110-130

<sup>3</sup> Hart, Sir G. (1999) *The Funding of Marriage Support: A Review*, Lord Chancellor's Department, para.9

<sup>4</sup> Glendon, M.A. (1981) *The New Family and the New Property*, p.28

could on its own.”<sup>5</sup> Even then however any effects on behaviour created by the law alone are likely to be modest.

The Government needs to take a holistic attitude towards supporting marriages by not only providing direct marital support but also by developing policies in such areas as welfare, housing, the economy and employment which create nurturing, supportive environments and communities in which families can flourish. An all-embracing Marriage Act as suggested in Chapter 4 could assist this holistic approach.<sup>6</sup>

The Government needs to be clear in its aims with respect to the family. It is not the prevention of divorce with which the Government should be concerned but the maintenance of stable relationships. Whilst the former should flow from the latter there are essential differences between the two. Given the heightened expectations of modern couples, unless a satisfactory degree of marital felicity is established and maintained then divorce rates are only likely to spiral ever upwards.

There must be a complete change in emphasis in relation to marital support from tertiary to primary intervention. The experience of the information pilots together with lessons from other jurisdictions confirm what common sense should already have told us, namely that few marriages will be saved on the brink of divorce. Early intervention is crucial and the Government needs to get across the message to the general public that support should be sought as a first, not a last resort. Taking urgent steps to ensure that the support available is accessible and affordable, is tailored to individual needs and is available at the point of need will assist in creating the necessary environment to ensure that help is sought at an early stage. Improving accessibility etc. is likely to take a commitment of significantly greater financial resources to marital support than is given at present.

The majority of people want to make the best of their marriage. Government support should therefore go beyond the provision of support for troubled marriages to providing information and support on enhancing and maintaining marital satisfaction.

For some the decision to cohabit is an active decision to reject what may be seen as the constraints of marriage. For others it is a precursor to marriage, a “trial run” at a time when they are not willing or ready to give the degree of commitment perceived necessary for marriage. In those circumstances the rights and responsibilities of marriage should not be imposed upon them. Others however drift into cohabitation with the mistaken belief that after a period they acquire the same rights and responsibilities as those who marry. Steps should therefore be taken to expose the “common law marriage myth” to ensure that the decision to cohabit is more of an informed choice. Cohabitants should however be given the same degree of support as those who marry. Their commitment, whilst different in nature, is not necessarily inferior to that shown by married couples.<sup>7</sup> Their children have the same rights to be raised in optimal circumstances, as do the children of the married.

The retention of fault in divorce legislation serves no useful purpose and may escalate conflict. It should therefore be removed at the earliest opportunity and breakdown proved by the passage of a specified period. Information Meetings, the Meeting With a Marriage Counsellor and counselling should be included in any amended legislation, with the modifications outlined above incorporated. It is essential that access to free counselling is available at the point of need and not restricted to those already within proceedings.

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<sup>5</sup> Glendon, M.A. (1989) *The Transformation of Family Law, State, Law, and Family in the United States and Western Europe*, p.312

<sup>6</sup> See Chapter 4, para. 7.7

<sup>7</sup> Lewis, J. (1999) ‘Marriage and cohabitation and the nature of commitment’ *C.F.L.Q.R.*, Vol. 11, No 4, p.363



Ultimately, the answer to the question can law modify behaviour is that in isolation its effect is likely to be minimal but that it may have some success, albeit modest, if the behaviour modification sought does not run too contrary to prevailing social norms. The answer to the specific question of whether law can save the 'saveable marriage' is probably not if attempts to save that marriage are only taken when it has reached crisis point. However if the symbolic effect of the law and the existing social norm of commitment to the ideal of marriage are galvanised at the same time as legal and other social policy measures are developed so that support is given to maintain and improve marital satisfaction levels before significant problems develop and any difficulties are dealt with promptly before the uncoupling process has taken root then there is the possibility of seeing some modest success.

Family law is at a crossroads. There exists at present a real opportunity for the Government to bring about a fundamental change of focus in the area of marital support by committing itself to supporting stable relationships rather than intervening to try to save what is already almost unsalvageable. One can only hope that this opportunity will be seized without reservation.

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